TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 206

PETER HAGAN AND EDWARD F. MARTIN, PETITIONERS,

vs.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 8, 1900.
CERTIORARI AND RETURN FILED DECEMBER 29, 1900.

(17,985.)

(17,985.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 206

PETER HAGAN AND EDWARD F. MARTIN, PETITIONERS,

vs.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the district court of the United States for the eastern district of Pennsylvania	1	1
Caption	1	1
Libel	3	1
Policy	6	3
Stipulation for costs	15	9
Citation	15	9
Answer	16	10
Statement of facts and conclusions of law for respondent	18	12
Depositions for libellants	21	14
Testimony of David P. Billington	21	14
Peter Hagan	29	19
Edward F. Martin	31	21
Opinion of McPherson, J	33	22
Decree	35	24
Order allowing appeal	36	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 17, 1901.

	Original	Print
Petition for appeal	36	24
Assignment of errors	37	25
Bond on appeal	38	26
Clerk's certificate	39	26
Hearing and submission	41	27
Opinion	42	27
Decree	45	29
Order for mandate	46	29
Mandate	47	29
Bill of costs	51	31
Clerk's certificate	52	31
Writ of certiorari	54	31
Stipulation as to return	57	32
Return to writ of certiorari	58	32

a *Transcript of Record.*

United States Circuit Court of Appeals for the Third Circuit, March Term, 1900.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Respondents, Appellants,
vs.
PETER HAGAN and EDWARD F. MARTIN, Libellants, Appellees. } No. 6.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

Filed January 16, 1900.

1 & 2 In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

PETER HAGAN and EDWARD F. MARTIN
vs.
THE SCOTTISH UNION AND NATIONAL INSURANCE Company. } No. 4 of 1899.

Damages—Breach of Contract of Insurance.

Pleas before the honorable the judge of the district court of the United States for the eastern district of Pennsylvania.

It is thus contained:

Be it remembered that on the 11th day of January, A. D. 1899, Horace L. Cheyney, Esq., and John F. Lewis, Esq., proctors of said court, come into court and exhibit the libel and complaint of Peter Hagan and Edward F. Martin, against The Scottish Union and National Insurance Company, in a cause of contract of insurance, civil and maritime, which being read is in the words and figures following, to wit:

3 *Libel.*

To the Honorable William Butler, judge of the district court of the United States for the eastern district of Pennsylvania, in admiralty:

The libel and complaint of Peter Hagan and Edward F. Martin against the Scottish Union & National Insurance Company, in a cause of breach of contract of marine insurance, alleges as follows:

First. That on or about December 19, 1897, the respondent, in consideration of a premium of $25, issued a policy of insurance to "Peter Hagan & Company for account of whom it may concern for the term of one year from the 19th day of November, 1897, at noon, to the 19th day of November, 1898, at noon, against all direct loss or damage by fire," except as thereinafter provided, to an amount

not exceeding $2,000, on the iron tug "Senator Penrose," her hull, tackle, apparel, engines, boilers, machinery, appurtenances, furniture and supplies. A copy of said policy is hereto attached and is made part hereof.

Second. That on December 19, 1897, the date when said policy was issued, Peter Hagan was the sole owner of said tug, and said insurance was obtained by him for the purpose of insuring the entire interest in said tug, for a period of one year.

Third. That on June 15, 1898, the said Peter Hagan sold to Edward F. Martin one-half interest in said tug "Senator Penrose," and at the time of the sale of said interest it was agreed by the said Peter Hagan and the said Edward F. Martin, that the latter should be entitled to the benefit on one-half the insurance under said
4 policy, and that he should pay his *pro rata* share of said premium on said policy from the time of the commencement of his interest until the expiration of said policy, and in accordance with said agreement the said *pro rata* share of the premium was thereupon charged to the said Martin in his accounts with the said Peter Hagan, and the payment thereof was assumed by him and he became liable for the same to the said Peter Hagan.

Fourth. That on July 30, 1897, the said steamtug "Senator Penrose" was greatly damaged by fire, which did not occur by any of the exceptions specified in said policy, and thereafter the said libellants and the adjusters representing the respondent and the underwriters upon said tug agreed upon the sum of twenty-three hundred dollars as the amount of the damage to said tug.

Fifth. That at the time of said fire on July 30, 1897, the said tug was owned by the said Peter Hagan and the said Edward F. Martin, the libellants, each being the owner of one-half part thereof.

Sixth. The said policy of insurance issued by the respondent provides, *inter alia*, "other insurance permitted without notice until required" and on July 30, 1897, at the time of the said fire, the libellants had another policy on said tug "Senator Penrose" in the National Standard Insurance Company, in the sum of one thousand dollars, said policy being similar to the one hereto attached, and under said agreement as to the amount of damage there became due by the respondent the sum of fifteen hundred and thirty-three dollars and thirty-three cents, and by the said National Standard Insurance Company the sum of seven hundred and sixty-six dollars and sixty seven cents, in all the sum of twenty-three hundred dollars—the amount of the damage agreed upon as hereinbefore stated.

Seventh. That on or about the eighth day of August, 1898, the libellants presented to the respondents proper proofs of loss under said policy, as required by the provisions thereof.

5 Eighth. That the libellants have performed all things on their part to be performed.

Ninth. That the said National Standard Insurance Company has paid the libellants its proportion of said damage or loss, yet the said Scottish Union & National Insurance Company, the respondent, has failed to pay the libellants its proportionate share of the loss sus-

tained by reason of said fire, and they therefore claim to recover from the respondent the said sum of fifteen hundred and thirty-three dollars and thirty-three cents with interest from October 8, 1898, in accordance with the terms of said policy.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that a citation according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction may issue to the said Scottish Union & National Insurance Company, citing and admonishing it to appear and answer all and singular the matters aforesaid; and that the court will pronounce for the damages as aforesaid with interest and costs; and will give to libellants such other and further relief as in law and justice *he* may be entitled to receive.

(Signed) HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Proctors for Libellants.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss:

Peter Hagan & Edward F. Martin being duly sworn according to law, says that the facts set forth in the foregoing libel are true to the best of their knowledge, information and belief.

(S'g'd) PETER HAGAN.
EDWARD F. MARTIN.

Sworn and subscribed before me this 11th day of January A. D. 1899.

J. F. WALLACE,
[SEAL.] *Notary Public.*

6 No. 7 M. Stock. Policy.

2,139,457. $2,000.

Scottish Union & National Insurance Company.

35 St. Andrew square,
Edinburgh.
3 King William street,
London.

Martin Bennett,
manager.

United States branch,
Hartford, Conn.

James H. Brewster
ass't manager.

Established 1824.

In consideration of the stipulations herein named and of twenty-five dollars premium does insure Peter Hagan and Company for account of whom it may concern for the term of one year from the 19th day of November 1897, at noon, to the 19th day of November 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding two thousand

dollars to the following-described property while located and contained as described herein, and not elsewhere, to wit:

On the iron tug "Senator Penrose," her hull, tackle, apparel, engines, boilers, machinery, appurtenances, furniture and supplies.

Privilege to engage in such employment as may be incidental to her trade; also to lay up and haul out on railways and dry docks and to undergo alterations and repairs; also to use kerosene oil for lights.

Other insurance permitted without notice until required.

N. Y. and Penna. standard,
Percentage coinsurance clause.

7 If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than 80 per cent. of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said 80 per cent. of the actual cash value of such property.

Attached to policy No. 2,139,457 Scottish U. & N. Insurance Co.

S. D. HAWLEY & SON,
Agent-, Resident Managers.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated

8 herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has

or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within-described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building or ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) or use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fire-works, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights
9 and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

The company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensue, and, in that event, for the damage by fire only), by explosion of any kind or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manu-

scripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless
10 duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so *be* endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not in any case of removal, whether to one or more locations, be liable beyond the proportion that
11 the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article

and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property, since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish if required verified plans and specifications of any building fixtures, or machinery, destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if
12 originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire, than the

amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal,
13 this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto.

Provisions required by law to be stated in this policy.—It is hereby expressly provided that the capital stock and funds of the company (excluding the life assurance fund in accordance with the life assurance companies' acts of the United Kingdom), and the uncalled amount of the authorized share capital of the company of thirty million dollars, shall be liable to make good all claims under this policy, but so that no member of the company shall be liable for more than the amount of his or her share of such uncalled capital.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of
14 agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

This policy is made and accepted on the above express conditions; and in witness whereof, the undersigned being duly authorized hereunto, for and on behalf of Scottish Union & National In-

surance Company, has subscribed his name to these presents, at Hartford, to be valid, however, only when countersigned by the duly authorized agent of the company at Philadelphia.

Countersigned at 140 S. 4th St., Phila., Pa., this 19th day of November 1897.

MARTIN BENNETT,
Manager at Hartford, Conn.

S. D. HAWLEY & SON,
Agent-, Resident Managers.

15 And thereupon on the same day stipulation for costs on behalf of the libellant being entered is in the words and figures following, to wit:

UNITED STATES,
Eastern District of Pennsylvania, } ss:

On this eleventh day of January, A. D. 1899, and in the one hundred and twenty-third year of the Independence of the said United States, in open district court of the United States, personally appeared Edward F. Martin and Thomas J. Sheehan and by stipulation in due course of law acknowledged themselves to be indebted to the United States of America, for the use of all persons who may be interested in the premises, in the sum of two hundred and fifty dollars, to be levied of their and each of their goods and chattels, lands and tenements.

On condition that if the libellants in the above action, shall pay all costs which by the decree, mandate or practice of the court they may become liable to pay, then this stipulation to be void and of no effect: Otherwise to be and remain in full force and virtue, and execution to issue thereon forthwith for the amount of such costs, at the instance of any person interested as aforesaid.

EDWARD F. MARTIN. [SEAL.]
THOMAS J. SHEEHAN. [SEAL.]

Taken, acknowledged and subscribed, this 11th day of January, A. D. 1899, in open court.

CHAS. T. MURPHY,
Pro Clerk D. C.

And thereupon process of citation issues and with acceptance of service thereafter endorsed is in the words and figures following, to wit:

UNITED STATES,
Eastern District of Pennsylvania, } ss:

The President of the United States of America to the marshal of the eastern district of Pennsylvania, Greeting:

Whereas, a libel has been filed in the district court of the United States, in and for the eastern district of Pennsylvania, on the eleventh day of January, A. D. 1899, by Peter Hagan and Edward F. Martin

against the Scottish Union and National Insurance Company, in a certain action, civil and maritime, for damages for breach of contract of insurance of the tug "Senator Penrose" therein alleged to be due the said libellant, amounting to one thousand five hundred
16 and thirty-three and $\frac{33}{100}$ dollars, and praying that a citation may issue against the said defendant, pursuant to the rules and practice of this court.

Now, therefore, you are hereby commanded to cite and admonish the said defendant, if it shall be found in your district, that it be and appear before the said district court, on Friday, the 27th day of January, A. D. 1899, at ten o'clock in the forenoon of said day, then and there to answer the said libel and to make its allegations in that behalf. And have you then and there this writ.

Witness the Honorable John B. McPherson, judge of said court at Philadelphia, this eleventh day of January, A. D. 1899, and in the one hundred and twenty-third year of the Independence of the said United States.

CHARLES S. LINCOLN,
Clerk District Court.

[SEAL.]

I hereby accept service of the within writ on behalf of the respondent.

HENRY R. EDMUNDS,
Att'y for Respondent.

And afterwards, to wit, on the 4th day of March, A. D. 1899, Henry R. Edmunds, Esq., proctor as aforesaid, comes into court and exhibits the answer of the Scottish Union and National Insurance Company to the libel and complaint aforesaid and the same being filed is in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

PETER HAGAN and EDWARD F. MARTIN
vs.
THE SCOTTISH UNION AND NATIONAL INSURANCE Company. } No. 4 of 1899.

To the honorable the judges of said court:

The answer of the Scottish Union and National Insurance Company to the libel and complaint of Peter Hagen and Edward F. Martin, alleges as follows:

17 First. That the said respondent admits *that* the allegations of the first paragraph of said libel to be true.

Second. This respondent admits the issuance of the policies to Peter Hagan as set out in the said second paragraph of said libel, but whether the said policy was for the purpose of insuring the entire interest in said tug this respondent is not now informed and asks to have the same proven if material.

Third. This respondent has no knowledge of the truth or falsity

of the allegations of the third paragraph of the said libel and asks to have the same proven if material.

Fourth. The respondent further avers and says that the facts set forth in the fourth paragraph of said libel are true as this respondent believes.

Fifth. The respondent answering the fifth paragraph of said libel alleges that he has no certain knowledge of the facts therein related, that the respondent company had no notice of any transfer or sale to Edward F. Martin of any portion of said tug at any time before said fire.

Sixth. The respondent in answer to the sixth paragraph of said libel alleges that he believes the same to be true as therein stated.

Seventh. The respondent admits the allegations of the seventh paragraph of said libel.

Eighth. Respondent denies the allegations set forth in the eighth paragraph of said libel and alleges that the libellants have not performed all things on their part required to be performed by the terms of the insurance in that no notice was given of the change of ownership or of the interest in the said tug by the respective libellants as required by the terms of the policy.

Ninth. That it is true as is alleged in the ninth article of said libel that this respondent company has not paid to libellants the sum of money therein claimed. The respondents alleging and claiming that they are advised that they are in no respects responsible to libellants, the ownership of the tug not being at the time of the loss the interest insured against and they the respondent corporation not having had any notice of any change therein.

That all and singular the premises are true, whereof respondent corporation prays to be hence dismissed with *his* reasonable costs.

SCOTTISH UNION AND NATIONAL INSURANCE CO. OF EDINBURGH, SCOTLAND.
S. D. HAWLEY & SON, *Agents.*

18 STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

Warren A. Hawley, of the firm Sam'l D. Hawley & Son, agents of The Scottish Union and National Insurance Company *of* respondent corporation, being duly sworn according to law deposes and says, that the facts set forth in the above and foregoing answer are true to the best of his knowledge, information and belief.

WARREN A. HAWLEY.

Sworn and subscribed to before me this 3d day of March, A. D. 1899.

H. F. REARDON,
[SEAL.] *Notary Public.*

And afterwards, on the 6th day of October, A. D. 1899, the cause comes on to be heard on libel, answer and proofs, and statements of facts and conclusions of law on behalf of the respective parties are

presented and read, but those of the respondent alone being filed are in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

PETER HAGAN and EDWARD F. MARTIN
vs.
THE SCOTTISH UNION AND NATIONAL INSURANCE Company. } No. 4 of 1899.

Statement of Facts on Behalf of Respondent.

On the nineteenth day of December, 1897, the respondent company issued to Peter Hagan and Company for account of whom it may concern, a policy of insurance against fire on the tugboat "Senator Penrose." A correct copy of said policy is annexed to the libel and made part thereof.

On the fifteenth day of June, 1898, Peter Hagan, who with his son, comprised the firm of Peter Hagan & Company, sold one-half of said steamtug to Edward F. Martin, the other libellant.

19 No notice of this sale and transfer was given to the respondent company nor had it any knowledge of the same.

It is provided by the terms of said policy, among other things, that, "if the interest of the insured be other than unconditional and sole ownership," or "if any change other than by death of the insured take place in the interest, title or possession of the subject of insurance * * * whether by legal process or judgment or by voluntary act of the insured, or otherwise, or if this policy be assigned before the loss," the entire policy shall be void.

The libellants claim that the words "for whom it may concern" entitles them to recover.

The respondent contends that the words "for whom it may concern," can and do only mean, for whom it concerned at the time of making the insurance.

Conclusions of Law.

It was decided in De Bolle *vs.* The Pennsylvania Ins. Co., reported in 4th Wharton, page 63, that:

"No one can claim the benefit of an insurance made by another for account of whom it may concern without showing that it was the intention of the person obtaining the insurance to embrace his interest in the goods at the time of the insurance."

And in Fire Association *vs.* Merchants' and Miners' Transportation Company, reported in 7th Atlantic Reporter, page 905, the court of appeals of Maryland, say:

"That any one having title to the property at the time of the loss may by adoption of the contract avail himself of its advantages provided that it be shown that his interest was within the contemplation of the party procuring the insurance."

And in the case of Mosser *vs.* Donaldson, 10th Atlantic Rep., page 766, in which a builder and a land-owner entered into a contract*ion* for the erection of a building it being provided that the builder should keep the building insured "for the benefit of whom it may concern," it was held that the expression "for the benefit of whom it may concern," applied only to the parties to the contract.

See also cases cited in Encyclopedia of Law, vol. VIII, pp. 87 and 88, 1st edition.

It has also been decided in a multitude of cases, that any change in the ownership or title of the property insured, makes the insurance and policy void.

In the case at bar the possession of the tug was also changed, Martin taking possession as master.

Sherwood *vs.* Agricultural Ins. Co., 73 N. Y., 447.
Hine *vs.* Woolworth, 95 N. Y., 75.
20 Smith *vs.* Phœnix Ins. Co., 23 Pac. R., 333.
Fire Ass'n *vs.* Flournoy, 19 S. W. Rep., 793.
Tollman *vs.* Atlantic Fire and Marine, 29 How., 71 N. Y.
Abbott *vs.* Hamden Ins. Co., 30 Maine, 44.

In the present case there was no assignment of the policy and no assent of the company and no notice to it of any transfer of a partial interest.

In Schroedel *vs.* Humboldt Fire Insurance Co., 27 Atl. Rep., p. 1077 (S. C. of Penna.) it was said:

"A condition in a fire-insurance policy that it shall be void, if the interest of the insured be not truly stated therein, or if the interest in the insured be other than the unconditional and sole ownership," precludes a recovery where the title to the property is in the insured and his wife jointly.

Oldham *vs.* Anchor Mutual Fire Ins. Co., 57 N. W. Rep. (Feb. 24, 1894), p. 861:

"Where a policy on property used and owned by a partnership runs to the partners jointly, a condition that the property shall not be sold or transferred, or any change take place in the title or possession, is broken if two of the partners sell and deliver their interest to the other partner, and the latter cannot recover to the extent of his original interest."

And on the same day depositions on behalf of the libellant being present-, read, and filed, are in the words and figures following, to wit:

21 *Depositions.*

Deposition taken in behalf of the libellants at the offices of Messrs. Lewis and Cheyney, room 348–349 Bourse building, Philadelphia, on Friday, March 10, 1899, at 3.30 p. m.

Present: Horace L. Cheyney, Esq., for the libellant; Henry R Edmunds, Esq., for the respondent.

DAVID P. BILLINGTON, being duly sworn according to law, was examined as follows:

By Mr. CHEYNEY:

Q. Mr. Billington, what is your business?
A. Insurance broker.
Q. How long have you been engaged in that business?
A. On my own account?
Q. On your own account or otherwise?
A. 12 years.
Q. How long have you been on your own account?
A. Two years and two months.
Q. With whom were you connected before that time?
A. Mather & Company.
Q. What class of business have you transacted during that time, marine business or general business?
A. General business, mostly fire and marine.
Q. What kind of business does Mather & Company transact?
A. General business, fire and marine.
Q. Have they a large marine business?
A. Very large.
Q. Probably as large as any marine business of any firm in the city?
A. I don't think there is any doubt about that.
Q. Did you have anything to do with the insurance issued to Peter Hagan & Company for account of whom it may concern
22 upon the tug "Senator Penrose" by the Scottish Union & National Insurance Company, in the month of November, 1897?
A. Yes, sir; I placed the insurance with that company for Mr. Hagan's account, by Mr. Hagan's orders.
Q. Had you placed other policies for that company, the Scottish Union?
A. Yes, sir.
Q. On this character of property?
A. Yes, sir.
Q. You were acting as broker for Mr. Hagan, I suppose?
A. Yes, sir.
Q. Do you remember what insurance you applied for for account of whom it may concern?

(Objected to by Mr. Edmunds, as the application is in writing.)

(Mr. Cheyney, replying, calls upon Mr. Edmunds to produce the application.)

A. Yes, sir, Peter Hagan & Company.

Q. I mean so far as the tug is concerned, what portion of the boat, or was it the whole of the boat?

A. The whole boat.

Q. So far as you remember, did the Scottish Union Insurance Company ask for any information as to the persons intended to be covered by this policy under the clause for account of whom it may concern?

A. No, sir.

Q. The policy was actually issued upon the application?

A. Yes, sir; precisely as per the form drawn by me.

Q. Do you know whether this is the policy which was issued or not?

A. Yes, sir; that is the policy.

(Policy marked "Libellant's Exhibit No. 1, March 10, 1899, W. H. S., Jr.," and offered in evidence.)

Q. At the time Mr. Hagan ordered you to apply for this insurance did he state the interest that he desired insured?

(Mr. Edmunds objects; the application will show.)

23 Q. What instruction did Hagan give you as to the interest to be insured?

(Objected to by Mr. Edmunds as immaterial.)

A. He told us to insure the tug "Senator Penrose" in the name of Peter Hagan & Company for account of whom it may concern.

Q. Do you know whether during the time this policy was in force any sale of interests took place in the "Senator Penrose"?

A. Yes, sir.

Q. What sale took place, if any?

(Objected to by Mr. Edmunds, unless he knows of his own knowledge.)

A. I saw the bill of sale for a half interest in the tug from Peter Hagan to Edward F. Martin.

(Mr. Edmunds calls for the bill of sale.)

Q. Did they consult with you as to the insurance?

(Objected to by Mr. Edmunds as immaterial and irrelevant.)

A. Yes, sir.

Q. Who consulted with you about it?

(Objected to by Mr. Edmunds as immaterial and irrelevant.)

A. Peter Hagan.

Q. I wish you would state what was said by you or by Mr. Hagan.

(Objected to by Mr. Edmunds.)

A. Peter Hagan told me that he had sold a half interest in the

tug "Senator Penrose" to Edward F. Martin, and asked me whether I thought it was necessary that it should be noted on the policy. He said that he did not think so. I agreed with him. He asked me how this other policy was covered, and I told him for account of whom it may concern. I told him I thought everything was perfectly in order; nothing further was done.

24 Q. Did you see any of the underwriters upon the tug "Senator Penrose" as to whether it was necessary to note this change?

(Objected to by Mr. Edmunds as immaterial.)

A. I saw the Marine Insurance Company; I happened to meet one of the men from the office, and he said it was not necessary.

(Objected to by Mr. Edmunds.)

Q. Who were the marine insurers?

A. Mather & Company.

Q. Now, Mr. Billington, you have stated that in your opinion it was not necessary that this change of interest should be noted upon that policy? Will you kindly state why you so stated?

(Objected to by Mr. Edmunds as immaterial and irrelevant.)

A. I was simply following out the custom I had been taught, and as it was the custom on the street.

Q. What is the custom on the street?

A. The general understanding of that phrase for account of whom it may concern.

Q. What is the general understanding?

(Objected to by Mr. Edmunds.)

A. On the street the general understanding is that it covers the interest of the owners, no matter when they acquire an interest in the property, and no matter whether at the time it is issued or subsequently.

Q. When you used the expression "on the street," what do you mean by that?

A. Among the insurance people, the insurance offices.

Q. From your experience, as a broker, do you say that is the commonly accepted meaning of that term?

(Objected to by Mr. Edmunds.)

25 A. Yes, sir.

Q. In insurance circles?

(Objected to by Mr. Edmunds.)

A. Yes, sir.

Q. At the time that you effected this insurance was this the only policy which you procured or did you procure other insurance?

(Objected to by Mr. Edmunds.)

A. Two policies I procured.

Q. What was the other?

A. The National Standard Insurance Company of New York.
Q. Do you remember the amount of the policies issued by these two companies?
A. Yes, sir, the Scottish Union was for $2,000 and the National Standard was for $1,000.
Q. Did you prepare the proofs of loss in this case?
A. Yes, sir.
Q. What was done with those proofs of loss, do you know?
A. The proofs for the National Standard Insurance Company were taken to New York by the adjuster of that company.
Q. Who was the adjuster?
A. Captain A. McKenzie. The proofs for the Scottish Union were handed to Mr. Nelson, representing the Scottish Union and National Insurance Company.
Q. Is that a copy of the proofs of loss?
A. Yes, sir.
Q. I see in this proof of loss there is a sum of $2,300—a compromise settlement. Do you know how those figures were arrived at?

(Objected to by Mr. Edmunds as immaterial.)

A. By compromise between Nelson and McKenzie, repre-
26 senting the underwriters, and Peter Hagan, the owners of the boat.

Q. Do you know as a matter of fact, of your own knowledge, Mr. Billington, whether there was any loss by fire upon the tug "Senator Penrose" during the life of this policy?
A. Yes, sir.
Q. Do you remember the date of the fire?
A. I think it was about July 5th. I have it in my books some place.
Q. Do you know, as a matter of fact, whether any of the insurance upon this tug has been paid or not?

(Objected to by Mr. Edmunds as immaterial.)

A. Yes, sir.
Q. What portion has been paid?
A. The National Standard for $1,000, has been paid.
Q. Do you know where that policy of the National Standard Company is?
A. Surrendered to the company.
Q. How did it compare so far as the form is concerned to the policy issued by the Scottish Union?

(Objected to by Mr. Edmunds.)

A. Exactly the same.

Cross-examination.

By Mr. Edmunds:

X Q. How old are you, Mr. Billington?
A. Twenty-nine last November.

X Q. You have been a broker on your own account for two years?
A. Two years and two months.
X Q. Did you see this boat burnt up?
A. No, sir.
X Q. Did you see her after she was burned?
A. Yes, sir.
X Q. How long afterwards?
A. Probably three months. It was not necessary for me
27 to see her. I didn't think it was necessary for me to see her.
X Q. No; yet you swear that she was burned up during the life of this policy?
A. Yes, sir.
X Q. You swear that, not from your own knowledge, but from information derived from others?
A. Yes, sir; that is right.
X Q. Then the exact fact is that you don't know whether she was burned or not during the life of this policy, except what you have heard?
A. No, sir; the boat must have been burned during the life of that policy, because I feel certain that the policy was then in force.
X Q. And that was three months after the alleged fire?
A. Yes, sir.
X Q. Now, you have no knowledge of her being burnt, except what you have heard from others?
A. Yes, sir; sworn to.
X Q. And most all you have testified to has been testified from information which you derived from other people, is that not so?
A. In regard to the burning of the boat?
X Q. And anything that you have testified to?
A. No, sir; not about the custom on the street.
X Q. The custom on the street is not of your own knowledge, but from your general experience?
A. From actual experience and from observation.
X Q. The facts are that Mr. Hagan spoke to you about having this change of ownership noted on the policy and you thought and you told him that it was not necessary?
A. He said he did not think it was necessary.
X Q. And you told him that you didn't think it was necessary?
A. I said I agreed with him.
X Q. And accordingly with your advice there was no alteration made in the policy?
A. Precisely.
28 X Q. Do you remember the date of this bill of sale that you are speaking about?
A. No, sir; I cannot remember that.
X Q. Who drew it?
A. I think it was drawn up at the custom-house. I didn't examine it carefully. I just noticed the name.
X Q. Now you have been in the marine business a long while.

Did you ever know of a bill of sale to be drawn at the custom-house?

A. I take that back. That was drawn up by Bailey. I was thinking of the enrollment papers.

X Q. What did you do with the proofs of loss against the Scottish Union?

A. As is usual with brokers——

X Q. What did you do with them?

A. We prepared these proofs.

X Q. What did you do with them?

A. The Scottish Union proof was handed to Mr. Nelson.

(Signature waived.)

29 Depositions taken in behalf of the libellant at the office of Messrs. Lewis and Cheyney, 348 Bourse building, Philadelphia, on Monday, March 27, 1899, at 3 p. m.

Present: Horace L. Cheyney, Esq., for the libellant; Henry R. Edmunds, Esq., for the respondent.

PETER HAGAN, being duly sworn according to law, was examined as follows:

By Mr. CHEYNEY:

Q. You were the owner of the tug "Senator Penrose" in the early part of last year when a policy was taken out in the Scottish Union Insurance Company?

A. Yes, sir.

Q. You sold a half interest in that tug to Edward F. Martin in June?

A. Yes, sir.

Q. At the time of the sale to Mr. Martin, was there any agreements between you and Mr. Martin as to the policies which were in force covering the tug?

(Objected to by Mr. Edmunds.)

A. Yes, sir; I sold the tug. He was to go on her and pay me so much for the half of her, and pay me for half of the policies, half of the insurance.

Q. That is, for the policies which were standing out on her?

A. Yes, sir; and some other little bills that he was to pay a portion of. What they are I cannot tell. When I sold this boat I gave the policies to the agent, David Billington, and he fetched it back and said it was all right, it didn't require any more endorsements on it.

(Objected to by Mr. Edmunds.)

30 Cross-examination.

By Mr. EDMUNDS:

X Q. Mr. Hagan, Martin you say was to sail this vessel as master?

A. Yes, sir; that is the reason I sold it to him.

X Q. And he was not to have this interest at all unless he would go as master?

A. Yes, sir; he paid for her; paid me a portion of it in money, and I have taken his note for the balance. I had taken something like a thousand dollars.

X Q. How much did he pay for it in cash?

A. I don't recollect now. I think it was something like $1,750 or $1,700.

X Q. Was that all in cash?

A. No, sir; he gave me two notes, I think $250 apiece.

X Q. The rest of it in cash, was it?

A. Yes, sir.

X Q. Don't that show on your books?

(Objected to by Mr. Cheyney as immaterial.)

A. I don't think that it does, because it was kind of a private affair. My son owned this boat and went away from me at this time, and I had to send to get this boat back again in my name.

X Q. Your son was the real owner of the boat?

A. I put her in his name when I bought the boat, but he didn't own any money at that time. He left and went away from here, and then I got him to transfer this boat and then I sold this interest in the boat to Martin.

X Q. Did he transfer it back to you after the time you sold to Martin?

A. No, sir; before that.

X Q. How long?

A. Four or five months before that, and I did not want him to know what I sold it for.

X Q. Well, your son transferred the boat back to you, and you got the insurance in the first instance?

31 A. No, there was no insurance on her, I don't think, before.

X Q. Can you give me the date of the transfer of the boat to you?

A. Only by the man who put it through the custom-house.

X Q. Well, there was a bill of sale from your son to you?

A. Yes, sir; Mr. Bailey attended to that end, and he done that, but there was no insurance on her at that time.

X Q. That is your recollection of it?

A. I am satisfied that there was not; I feel satisfied that there was no insurance on her, because I put the insurance on the boat.

X Q. Well, you got this insurance issued in the name of Peter Hagan & Company; who is the company?

A. There ain't no company; he was supposed to be the company at that time.

X Q. That is, your son was supposed to be?

A. Yes, sir.

(Signature waived.)

EDWARD F. MARTIN, being duly sworn according to law, was examined as follows:

By Mr. CHEYNEY:

Q. What is your business?

A. Following the water; mariner.

Q. Please state whether in the month of July, 1898, you owned any share in the tug "Senator Penrose"?

A. Yes, sir.

Q. What share did you own?

A. Own one-half, sir.

Q. When did you purchase that?

A. The thirteenth day of June, I think it was, last.

Q. From whom did you purchase that?

32 A. From Peter Hagan & Company.

Q. You say a half interest?

A. Yes, sir.

Q. At the time you purchased that interest, please state whether there was any agreement between you and Mr. Hagan in reference to the policies of insurance covering that boat?

(The form of the question is objected to by Mr. Edmunds.)

A. Well, yes, sir; there was an agreement or understanding that I was to pay just what was due, premium that was not run out, and I had the same privileges of the insurance policies as he would have. That was the understanding.

(Objected to by Mr. Edmunds.)

Q. You went on the boat as master afterwards, did you?

A. Yes, sir.

Cross-examination.

By Mr. EDMUNDS:

X Q. Did you pay cash or notes?

A. I paid part cash and part notes.

X Q. How much cash did you pay?

A. I paid $1,200 cash, and $500 in notes.

(Signature waived.)

33 And afterwards, on the 16th day of November, A. D. 1899, the opinion of the court being filed is in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

PETER HAGAN and EDWARD F. MARTIN
vs.
THE SCOTTISH UNION AND NATIONAL INSURANCE Company. } No. 4 of 1899.

McPHERSON, *J.:*

In December, 1897, Peter Hagan, who was then the sole owner of the tugboat Senator Penrose, took out a fire policy for one year in the respondent company, insuring Peter Hagan & Company, "for account of whom it may concern," to an amount not exceeding $2,000, "on the iron tug Senator Penrose, her hull, tackle, apparel, engines, boilers, machinery, appurtenances, furniture and supplies." Among the printed provisions of the policy, it is declared that the contract shall be void "if the interest of the insured be other than unconditional and sole ownership," or "if any change other than by the death of an insured, take place in the interest, title or possession of the subject of insurance whether by legal process, or judgment, or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss." In June, 1898, Hagan sold a half interest in the tug to Martin, but did not notify the company of the sale, or obtain its consent thereto. There was some discussion between Hagan and Martin concerning the effect of the sale upon the policy, and they took the advice of an insurance broker upon the subject, coming finally to the conclusion that the clause "for whom it may concern" was sufficient to protect the interest of Martin without further action. The sale included a half interest in the policy, and Martin accounted to Hagan for the proper share of the premium for the unexpired term.

In the month of July the boat was destroyed by fire. Proofs of loss were made, but the company refused to pay upon the ground that under the foregoing provisions of the policy the sale to Martin had made the contract void.

The decision of the case depends upon the effect to be given to the words, "for whom it may concern." This clause, so far as it may be in conflict with other language in the policy, must, upon
34 familiar principles, be regarded as dominant. It expresses the special agreement of the parties for it is in writing, while the conflicting provisions are in print; and general printed conditions usually give way to deliberately chosen written words. Moreover, even if the court doubted which provision should prevail, another well-known rule requires the policy to be construed against the company rather than against the insured; and, therefore, upon either ground, the clause now under consideration is controlling.

The effect to be given to it seems to be well settled. The Supreme Court in Hooper *vs.* Robinson, 98 U. S., 528, states it in this language:

"A policy like the one here in question, in the name of a specified

party 'on account of whom it may concern,' or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it provided the latter had the requisite authority from the former, or they subsequently adopted it."

1 Phillips, Ins., sect. 383.

"This is the result though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it."

Id., sect. 384.

"One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made."

Id., sect. 388.

"The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient."

The first step, therefore, in a given case is to determine what interest the person taking out the policy intended to protect. It is not essential that he should have had any specific individual in mind. It is enough if he intended to protect the interest that afterwards passed to the person injured; and if he so intended, the policy may be adopted afterwards by a subsequent sole or partial owner of the interest although such owner may have been unknown to the person taking out the insurance, or to the company, at the time the policy was written.

In the present case, I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object the policy would more naturally have been taken out in his own name, omitting the qualifying phrase; but he intended to protect the ownership of the boat, whether vested in
35 himself alone, or shared with, or transferred to, other persons. This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists. The facts bring the dispute within the rule laid down in Hooper *vs.* Robinson, and in other cases to which reference need not be made. In Mosser *vs.* Donaldson, 9 Cent. Rep. 153, S. C. 10 Atlan. Rep., 766, cited by the respondent, it clearly appeared that the parties intended that two persons only should have the benefit of a similar phrase, and this is the ground upon which a third person was denied the right to share in its protection. I do not think that the decision of the Maryland court of appeals in Fire Insurance Association *vs.* Merchants' Transportation Co., 7 Atlan. Rep., 905, is in conflict with the rule stated by the Supreme Court of the United States, but if there is a conflict, my duty is plain.

A decree will be entered in favor of the libellant for $1,533.33, with interest from October 8, 1898, and costs.

And afterwards, to wit, on the 17th day of November, A. D. 1899, decree being entered is in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

PETER HAGAN and EDWARD F. MARTIN,
vs.
THE SCOTTISH UNION AND NATIONAL INSURANCE Company. } No. 4 of 1899.

And now, November 17, 1899, the above case having been heard upon the pleadings and depositions and arguments of proctors for the respective parties thereon, it is ordered and decreed that the libel be sustained and that Peter Hagan and Edward F. Martin, the libellants shall recover from The Scottish Union and National Insurance Company, the respondent, the sum of $1,635.27, being the sum of $1,533.33, the amount claimed in the libel with interest thereon to date.

And afterwards, on the 24th day of November, A. D. 1899, the respondent, The Scottish Union and National Insurance Com-
36 pany, by their proctor aforesaid, present a petition for leave to appeal from the decree in this cause to the next United States court of appeals for the third circuit, with an assignment of errors and prayer for reversal, and the same being allowed and filed is in the words and figures following, to wit:

To the Honorable John B. McPherson, judge of the district court of the United States in and for the eastern district of Pennsylvania:

The petition of the Scottish Union and National Insurance Company, respectfully represents:

1. That Peter Hagan and Edward F. Martin filed a libel in your honorable court, No. 4 of 1899, against your petitioner, The Scottish Union and National Insurance Company, to recover the sum of $1,533.33, together with interest from October 8, 1898, alleged to be due the libellants under the terms of — certain policy of insurance fully set forth in said libel.

That an answer was filed to said libel and evidence taken in behalf of libellants. The respondent, your petitioners, took no evidence, claiming that the libel and libellants' evidence made out no cause of action and that the libel should be dismissed.

2. That the cause came on to be heard before your honorable court and a decree was subsequently, to wit, on the seventeenth day of November, A. D. 1899, *a decree was* entered in favor of said libellants for the full amount of their said claim as aforesaid, with interest from the eighth day of October, A. D. 1898 and costs of suit.

Your petitioners are advised and believe that the said decree is erroneous and that a decree should rightfully have been ent-red dismissing the said libel.

Therefore your petitioners pray that they may be allowed to appeal from said decree to the next term of the circuit court of appeals of the United States for the third circuit and that said decree be reversed and a decree entered in favor of your petitioner- dismissing the libel aforesaid.

SCOTTISH UNION AND NAT'L INS. CO.,,
By S. D. HAWLEY & SON,
Resident Manager-.

EASTERN DISTRICT OF PENNSYLVANIA:

John C. Mellor, a member of the firm of S. D. Hawley & Son, being duly sworn according to law deposes and says, that he is the resident agent of The Scottish Union and National Insurance
37 Company, the above-named petitioners, and that the facts set forth in the foregoing petition are true and he verily believes that this appeal is not taken for delay.

JNO. C. MELLOR,
Of and for S. D. Hawley & Son, Resident Managers.
JNO. C. MELLOR.

Sworn and subscribed before me this 24th day of November, A. D. 1899.

H. F. REARDON,
[SEAL.] *Notary Public.*

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

PETER HAGAN and EDWARD F. MARTIN
vs.
THE SCOTTISH UNION AND NATIONAL INSURANCE Company.
} No. 4 of 1899.

Assignments of Error.

1. The learned judge of the district court erred in holding that it was not essential the person taking out the policy should have any specific individual in mind. That it was enough if he intended to protect the interest that afterward passed to the person injured, and that if he so intended the policy may be adopted afterwards by a subsequent sale or partial owner of the interest, although such owner may have been unknown to the person taking out the insurance or to the company at the time the policy was written.

2. The learned judge of the district court erred in holding that Hagan intended to protect the ownership of the boat whether vested in himself alone or shared with or transferred to other persons.

3. The learned judge of the district court erred in holding that the facts brought the dispute within the rule laid down in Hooper *vs.* Robinson.

4. The learned judge of the district court erred in sustaining the libel.

5. The learned judge of the district court erred in directing a decree to be entered in favor of the libellant.

38 6. The learned judge of the district court erred in directing a decree for libellant in the sum of $1,533.33 with interest from October 8, 1898.

7. The learned judge of the district court erred in not directing a decree dismissing the libel.

HENRY R. EDMUNDS,
Proctor for Petitioner.

Know all men by these presents, that the "American Surety Company of New York" (office 102 Bullitt building) in the city of Philadelphia, and State of Pennsylvania, is held and firmly bound unto Peter Hagan and Edward F. Martin, in the sum of two thousand dollars, lawful money of the United States, to be paid to the said Peter Hagan and Edward F. Martin, to which payment well and truly to be made the said The "American Surety Company of New York" binds itself and its successors firmly by these presents, sealed with its seal and dated at Philadelphia, this sixth day of December, A. D. one thousand eight hundred and ninety-nine.

Whereas, the "Scottish Union and National Insurance Company" has lately appealed to the United States circuit court of appeals in the third circuit from the decree of the Honorable John B. McPherson, judge of the district court of the United States, for the eastern district of Pennsylvania, made and pronounced in a certain plea civil and maritime for damages for breach of contract therein lately depending between the said Peter Hagan and Edward F. Martin, libellants, appellees, and The "Scottish Union and National Insurance Company," respondents, appellants.

Now, if the said appellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then this stipulation shall be void, otherwise to be and remain in full force and virtue.

AMERICAN SURETY CO. OF N. Y. [SEAL.]
SAM'L T. FREEMAN, *Res't. Vice-Pres.* [SEAL.]
Attest: F. H. WILLIAMS, *Res Ass't Sec'y.* [SEAL.]

Taken and subscribed before me this sixth day of December, A. D. 1899.

WM. W. CRAIG,
Dep'y Clerk.

Sealed and delivered in the presence of us:
WM. W. CRAIG.
CHARLES S. LINCOLN.

39 & 40 UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

I, Charles S. Lincoln, clerk of the district court of the United States, for the eastern district of Pennsylvania, do hereby certify

the foregoing to be a true and faithful copy of the record and proceedings of the said district court in a certain plea, civil and maritime, for damages from breach of contract of insurance, therein lately depending wherein Peter Hagan and Edward F. Martin are the libellants against The "Scottish Union and National Insurance Company," respondent.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at Philadelphia this twelfth day of January, A. D. 1900, and in the one hundred and twenty-fourth year of the Independence of the United States.

WM. W. CRAIG,
Dep'y Clerk, District Court.

41 In the United States Circuit Court of Appeals for the Third Circuit.

And afterwards to wit: on the twelfth day of March A. D. 1900, this cause being called for argument on the transcript of record from the district court of the United States for the eastern district of Pennsylvania, before Hon. M. W. Acheson, Hon. George M. Dallas, and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit, on the first day of June A. D. 1900 comes the parties aforesaid by their counsel aforesaid and the court now being fully advised in the premises renders the following opinion, to wit:

42 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1900.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY
vs.
PETER HAGAN and EDWARD F. MARTIN. } No. 6.

Before Acheson, Dallas, and Gray, circuit judges.

DALLAS, *J.:*

By the libel in this case the appellees, Peter Hagan and Edward F. Martin, claimed to recover from the appellant, The Scottish Union and National Insurance Company, upon a fire policy on a tugboat, insuring Peter Hagan and Company, for account of whom it may concern. The court below entered a decree for the libellants, and thereupon the insurance company appealed.

The policy provided that it should be entirely void "if the interest of the insured be other than unconditional or sole ownership, * * * or if any change other than by the death of an insured, take place in the interest, title or possession of the subject of insurance, * * * whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss." A

change did take place in the interest, title and possession of the boat, for Hagan, during the life of the policy and before loss, sold a one-half interest therein (including a half interest in the policy) to Martin, and Martin became master of the boat. The company had no knowledge of this transaction, and of course did not consent to it. Soon thereafter the boat was destroyed by fire, and, the company having refused to pay, Hagan and Martin filed this libel, alleging that at the time of the fire, each of them was the owner of one-half part of the tug. Were they entitled to recover? They certainly were not,
43 unless the provisions of the policy which have been referred to were superseded and wholly set aside by the words "for account of whom it may concern," and, in our opinion, they were not. It is true that the written terms of a policy will control where they are in plain conflict with its printed clauses; but no part of the instrument is to be rejected if it can be sustained as a whole, and in the present instance the printed provisions in question and the written words "for account of whom it may concern" are not irreconcilably repugnant. That the policy was issued for account of whom it migh- concern is undeniable, but whom could it concern? Possibly, the then existing or future creditors of the boat, or, perhaps, the constituents of Peter Hagan and Company; but, no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of any one who, by the express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it.

It is not necessary to our conclusion that we should question the rule of law which was applied by the court below, and we do not do so. It is not doubted that a policy in the name of a special party, on account of whom it may concern, will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known; but we find nothing in this case to support a finding that Hagan intended to insure a subsequent vendee of the boat or of an interest therein. On the contrary, we think, as we have already said, that the retention in the policy of the provision that it should be entirely void if any transfer in interest, title or possession should be made, absolutely precludes the inference of an intent to make the policy applicable to any person claiming under or by virtue of such a transfer. Stipulations of this sort are of no little importance. It is -anifest
44 that insurers regard them as quite material, and the courts, we think, should not hesitate to enforce them wherever it is reasonably possible to give them effect.

Schroedel *v.* Ins. Co., 158 Pa. St., 459; Oldham *v.* Ins. Co., 57 N. W. Rep., 861.

The decree of the district court is reversed, and the case will be remanded to that court with direction to enter a decree dismissing the libel with costs.

Filed June 1, 1900.

45 United States Circuit Court of Appeals for the Third Circuit
March Term, 1900.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Appellant,
v.
PETER HAGAN and EDWARD F. MARTIN. } No. 5.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the district court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause, be, and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said district court with directions to enter a decree dismissing the libel with costs.

Philadelphia, June 12, 1900.

GEO. M. DALLAS, *J.*

46 United States Circuit Court of Appeals for the Third Circuit,
March Term, 1900.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Appellant,
v.
PETER HAGAN and EDWARD F. MARTIN. } No. 5.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

And now to wit this 2nd day of July A. D. 1900, it is ordered that mandate issue to the said district court of the United States for the eastern district of Pennsylvania in accordance with the opinion and decree of this court in said cause.

GEO. M. DALLAS, *Cir. Judge.*

47 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Whereas, lately in the district court of the United States for the eastern district of Pennsylvania, before you, or some of you, in a cause between The Scottish Union and National Insurance Company, respondents-appellants and Peter Hagen and Edward F. Martin libellants-appellees, wherein the decree of the said district court entered in said cause is in the following words viz:

"And now, November 7, 1899, the above cause having been heard upon the pleadings and depositions and arguments of proctors for

the respective parties thereon, it is ordered and decreed that the libel be sustained and that Peter Hagen and Edward F. Martin the libellants shall recover from The Scottish Union and National Insurance Company the respondents the sum of $1,635.27, being the sum of $1,533.33; the amount claimed in the libel with interest thereon to date,"

48 as by the inspection of the transcript of the record of the said district court, which was brought into the United States circuit court of appeals for the third circuit by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

49 And whereas, in the present term of March, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause, be, and the same is hereby reversed with costs, and that the said respondents, The Scottish Union and National Insurance Company, recover against the said libellants Peter Hagen and Edward F. Martin, sixty-one dollars for its costs herein expended and have execution therefor.

And it is further ordered that this cause be remanded to the said district court with directions to enter a decree dismissing the libel with costs.

Philadelphia June 4th 1900.

50 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the fifth day of July, in the year of our Lord one thousand nine hundred *and ninety.*

Costs of Appellant.

Clerk	$19.00
Printing record	22.00
Attorney	20.00
	$61.00

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 5, March term, 1900. Scottish Union and National Insurance Co. appellant *vs.* Peter Hagen and Edward F. Martin. Mandate. Filed July 5, 1900. Wm. H. Merrick, clerk.

51 United States Circuit Court of Appeals, Third Circuit, March Term, 1900.

Costs of Scottish Union and National Insurance Company in No. 5.

1900, March term—Docketing cause and filing record, $5.00; appearance, .25; filing precipe and receipt, 50c.; filing papers, $1.00	6 75
Filing briefs, $5.00; argument, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $4.00; cost of printing record, $18.00; attorney's docket fee, $20.00; costs and copy, .40	54 25
	61 00

Fee Book 2, page 266.

Test: WM. H. MERRICK,
Clerk Circuit Court of Appeals, 3d Circuit.

52 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to fifty-one inclusive, to contain a full, true, complete and faithful copy of the original transcript of record in the case wherein The Scottish Union and National Insurance Company, is appellant, and Peter Hagan and Edward F. Martin, are appellees, No. 5 March term 1900; on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-sixth day of November in the year of our Lord one thousand nine hundred and of the Independence of the United States the one hundred and twenty-fifth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

53 [Endorsed:] File No. 17,985. U. S. C. C. of appeals, 3rd circuit. Term No. 206. Peter Hagan and Edward F. Martin—petitioners—*vs.* The Scottish Union and National Insurance Company. Filed December 8, 1900.

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Scottish Union and National Insurance Company is appellant and Peter Hagan and Edward F. Martin are appellees which suit was removed into the said circuit court of appeals by virtue of

an appeal from the district court of the United States for the eastern district of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
55 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighteenth day of December, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

56 [Endorsed:] File No. 17,985. Supreme Court of the United States. No. 500, October term, 1900. Peter Hagan and Edward F. Martin, *vs.* The Scottish Union and National Insurance Co. Writ of certiorari.

57 Circuit Court of Appeals, Third Circuit, March Term, 1900.

SCOTTISH UNION & NATIONAL INSURANCE COMPANY, Appellants,
vs.
HAGAN ET AL., Appellees. } No. 6.

It is hereby agreed that the certified copy of the transcript of the record in this case, now on file in the office of the clerk of the Supreme Court shall be taken as a return to the writ of certiorari issued by the said Supreme Court to the circuit court of appeals for the third circuit, being No. 500 of October term 1900.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Proctors for Hagan et al., Petitioners.
HENRY R. EDMUNDS,
Proctor for Scottish Union & National Insurance Co., Respondent.

[Endorsed:] 6 March T. 1900 C. C. A. 3rd cir. Scottish Union &c. appellant *v.* Hagan *et al.* appellees. Agreement as to return to writ of certiorari.

58 UNITED STATES OF AMERICA, *set:*

I, —— ——, clerk of the United States circuit court of appeals, for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto as my return to the said writ.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 28th day of December in the year of our Lord one thousand nine hundred and of the Independence of the United States the one hundred and twenty-fifth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. 6, March term, 1900. United States circuit court of appeals, third circuit. Scottish Union and National Insurance Co. appellants *v.* Peter Hagan and Edward F. Martin appellees. Certified copy. Agreement of counsel as to return of writ of certiorari.

59 [Endorsed:] File No. 17,985. Supreme Court U. S. October term, 1901. Term No. 206. Peter Hagan *et al.* petitioners *vs.* The Scottish Union & National Insurance Company. Writ of certiorari and return. Filed Dec. 29, 1900.

To the Honorable, the Justices of the Supreme Court of the United States.

Peter Hagan and Edward F. Martin petition for a writ of *certiorari*, directed to the United States Circuit Court of Appeals for the Third Circuit, to bring before this Honorable Court the cause of the Scottish Union & National Insurance Company, respondent-appellant, versus Peter Hagan and Edward F. Martin, libellants-appellees.

Your petitioners respectfully allege and verify:

That the Scottish Union and National Insurance Company issued a policy insuring "Peter Hagan & Company *for account of whom it may concern* for the term of one year from the nineteenth day of November 1897, against loss or damage by fire, of the iron tug "Senator Penrose."

That at the time said policy was issued, said tug was owned solely by Peter Hagan, and that the latter, on June 14, 1898, sold a half interest therein to Edward F. Martin, the other petitioner. It was agreed as one of the terms of the purchase of this half interest, that the said Martin should have the benefit of the foregoing policy, and of the other policies upon the tug, then in existence. No assignment of this policy was made to Martin, nor was notice given to the company of the transfer of the interest. The attention of the broker, who had procured the policies upon the tug, was called to the transfer, and acting upon what is shown by the evidence to be the customary trade meaning of the clause "for account of whom it may concern" in Philadelphia, and after consultation with one of the other underwriters upon the tug, he advised the petitioners that it was unnecessary to have the sale or transfer noted upon the policy.

On July 30, 1898, the tug was burned, and subsequently the petitioners and adjusters representing the Scottish Union Company, and the other underwriter, who had insured under a similar policy, agreed upon the amount of the loss. The other underwriter paid its proportion of the loss, but the Scottish

Union Company having refused to pay its share, suit was brought against it in the District Court of the United States for the Eastern District of Pennsylvania.

The policy was written upon a printed form, commonly known as the "standard policy." This form of policy is intended to be used for insurance of property on land and nearly all of the printed clauses are entirely inapplicable to the insurance of marine property.

That amongst the other *printed* conditions of said policy were the following:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the assured be other than unconditional and sole ownership * * * or if any change be other than by death of an insured take place in the interest, title or possession of the subject of insurance (except changes of occupants without increase of hazard) whether by legal process, or judgment, or by voluntary act of the assured, or if this policy be assigned before a loss, etc."

The said insurance company defended said suit on the ground that under the foregoing printed conditions, the sale of the one-half interest of Martin, without notice to the company, and its consent thereto, caused the policy to be absolutely forfeited.

That after argument of said cause, before the Honorable JOHN B. MCPHERSON, Judge of said District Court, an opinion was filed by him, wherein he found as follows:

"In the present case, I have no doubt (and I find the fact to be) that Hagan intended to insure and keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time."

The learned Judge further held that under the law, as declared by this Court in *Hooper* v. *Robinson*, 98 *U. S.*, 528, the clause for "account of whom it may concern" caused the entire interest in the tug to be insured during the life of the policy, and that the interest acquired by Martin, under the agreement, was fully covered by the policy, and that as this

written clause expressed the immediate contract of the parties, the general printed conditions, upon which the respondent relied, should give way to the deliberately chosen words.

Thereupon a decree was entered by said District Court, in accordance with the said opinion, awarding the libellants the sum of $1635.27.

That thereafter an appeal was taken by the respondents from said degree to the Circuit Court of Appeals for the Third Circuit, and after hearing therein the opinion of the said Court by DALLAS, J., was filed, reversing the decree of the said District Court and ordering that said cause should be remanded with directions to enter a decree dismissing the libel.

That said Circuit Court of Appeals, as appears by said opinion, held that the printed words of said policy of insurance were not superseded by the written words "for account of whom it may concern," and that the said written and printed clauses were not repugnant, but must be construed together.

That in reaching the conclusion that the written clause, upon which the libellants relied and the pointed words upon which the respondents relied, were not repugnant, the said Court placed a construction upon the said clause "*for account of whom it may concern*," which your petitioners are advised by counsel is in direct conflict with the construction thereof by this Honorable Court in the case of *Hooper* v. *Robinson*, 98 *U. S.*, 528, and with decisions of the appellate courts of various States.

Your petitioners further aver that the decision of said Circuit of Appeals is contrary to not only the commonly accepted meaning of said clause in the insurance business, but is also contrary to the evidence as to the established trade meaning thereof in the insurance business in Philadelphia.

Your petitioners believe that the decree of said District Court, following the law as declared by this Court in *Hooper* v. *Robinson*, *supra*, was correct, and that the Circuit Court of Appeals erred in placing a different construction upon said words, and that injustice would be done to your petitioners if said decree of the Circuit Court of Appeals should stand.

Your petitioners further aver that the said Circuit Court of Appeals held that the alienation of the one-half interest in the tug by Hagan to Martin caused the forfeiture of the entire policy, and not only a forfeiture so far as the half interest sold was concerned, thereby preventing any recovery for the loss of the half interest remaining in Hagan.

That they are advised by counsel that this decision is in conflict with the decisions of various appellate courts, holding in such cases that a transfer works a forfeiture only so far as the interest may be transferred, and that there is no forfeiture so far as the interest of the person originally assured remains.

That your petitioners are advised by counsel and verily believe, that the questions of law arising upon the record are of sufficient gravity and public importance to render it proper in the interest of jurisprudence and uniformity of decisions, that this Honorable Court should review the decree of the said Circuit Court of Appeals.

Wherefore, they pray that this Honorable Court may be pleased to grant a writ of *certiorari* in this cause, to the said Circuit Court of Appeals for the Third Circuit to bring up this case for its review and determination and for such other and further proceedings as it may direct.

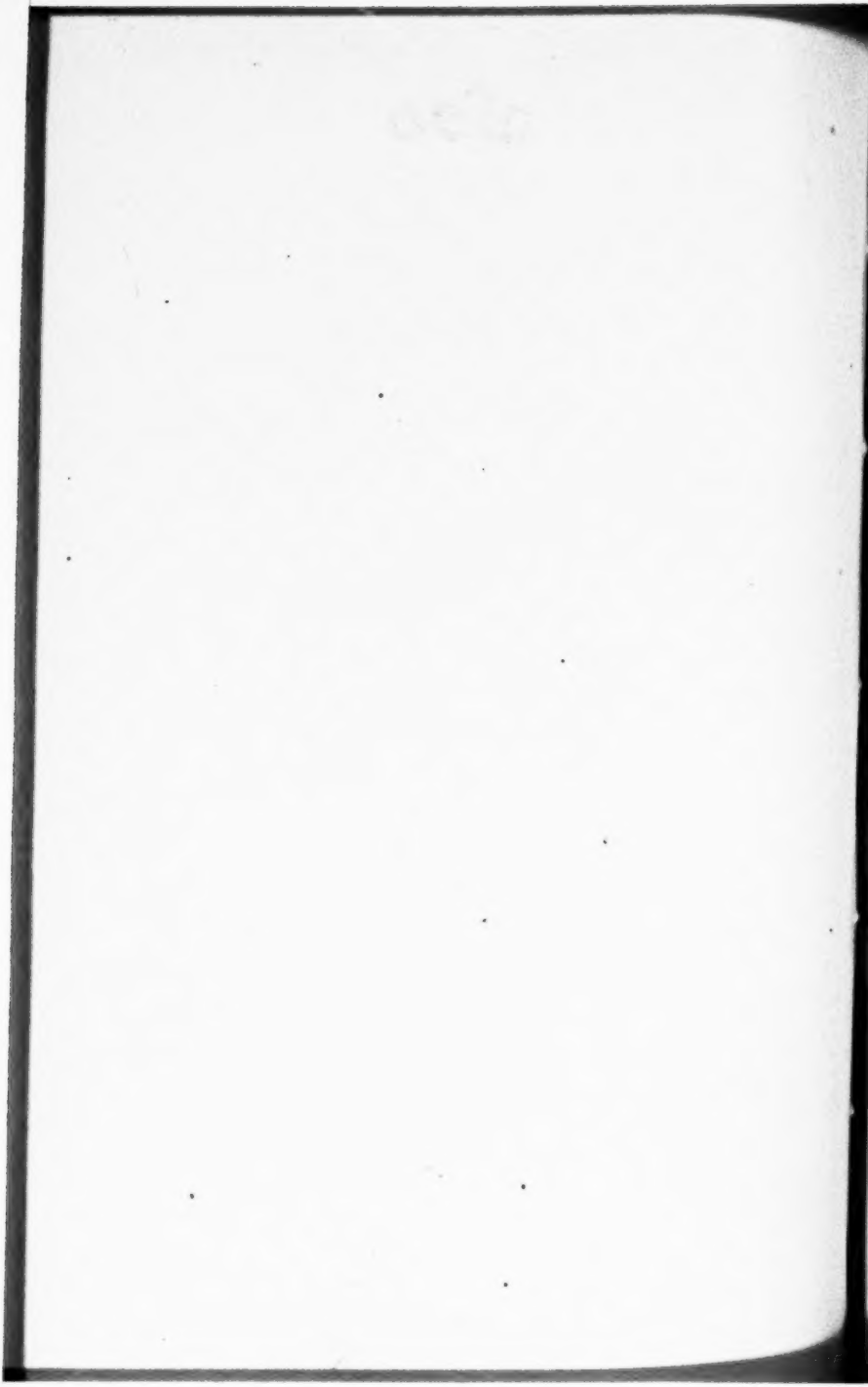
STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } *ss.* :

PETER HAGAN, being duly affirmed says that he is one of the petitioners and that the facts contained in the foregoing petition are true to the best of his knowledge, information, and belief.

Sworn to and subscribed before me this day of November, A. D. 1900.

We, John F. Lewis and Horace L. Cheyney, duly admitted to practice in the Supreme Court of the United States, hereby certify that we have examined the foregoing petition for a writ of *certiorari*, and that in our judgment from the matters stated herein the writ ought to issue.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel.



No. 206.

Brf. of Cheyney & 500 Leave for

Office Supreme Court
FILED
DEC 10 1900
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

Filed Dec. 10, 1900.

THE SCOTTISH UNION and NATIONAL INSURANCE COMPANY,
Respondent–Appellant,

v.

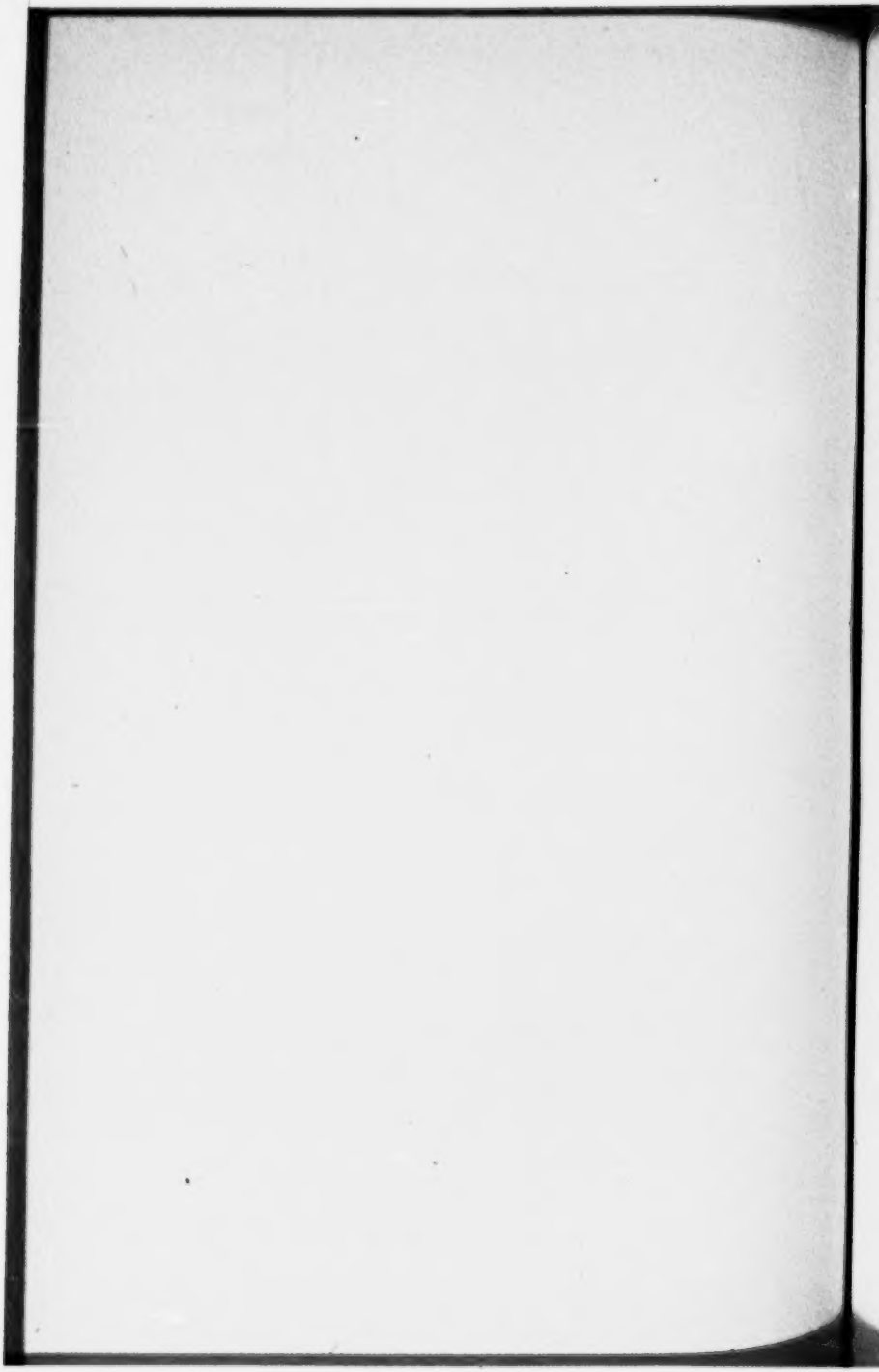
PETER HAGAN et al.,
Libellants–Appellees.

Petition of Peter Hagan et al., for a Writ of Certiorari to Issue to the Circuit Court of Appeals for the Third Circuit, in the above Entitled Action.

Brief on Behalf of Petitioners.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel.

BOURSE BUILDING,
PHILADELPHIA.



24049

IN THE

Supreme Court of the United States.

HAGAN, *et al.*,

Libellants-Appellees,

v.

THE SCOTTISH UNION & NATIONAL INSURANCE COMPANY,

Respondents-Appellants.

IN THE MATTER OF THE PETITION OF HAGAN ET AL., FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

The facts are fully stated in the petition.

It is submitted that a writ of "certiorari" ought to issue for the following reasons:

1. Because the Circuit Court of Appeals did not follow the construction of the clause "for account of whom

it may concern" by this Court in Hooper v. Robinson, 98 U. S. 528, but placed a different construction thereon.

2. Because the clause "for account of whom it may concern" is in general use, and the construction thereof by the Circuit Court of Appeals is contrary to its universally accepted meaning in the insurance business.

3. Because the decision of the Circuit Court of Appeals, as to the relative effect to be given to the written and printed clauses of a policy of insurance, is opposed to the established law upon the subject.

4. Because the decision of the Circuit Court of Appeals, that the conveyance of the half interest caused a forfeiture of the entire policy, is opposed to the general rule that there is no forfeiture so long as the person originally insured retains an insurable interest.

I.

The Circuit Court of Appeals did not follow the construction of the clause "for account of whom it may concern," by this Court, in Hooper v. Robinson, 98 U. S. 528.

The primary question is whether the general printed conditions of the policy, providing for a forfeiture in case of change of interest, etc., upon which the respondent relied, have any application whatever to the present contract of insurance. The answer to this question depends entirely upon the proper construction of the written clause of the

policy "does insure Peter Hagan & Company *for account of whom it may concern.*"

The learned Judge of the District Court followed the construction of that clause by this Court in *Hooper* v. *Robinson, supra*, and held, that as so construed, the printed forfeiture clause and the written clause were inconsistent, and that the latter, by the ordinary rules of construction, must prevail over the former.

The Circuit Court of Appeals reversed this decision and held that the two clauses were not "irreconcilably repugnant," but that Court could and did only reach that conclusion by placing a construction upon the written clause directly opposed to that of this Court in *Hooper* v. *Robinson, supra.*

The view of the Court of Appeals as to the meaning of this clause is thus expressed in the opinion of DALLAS, J. (Record, p. 40):

> "That the policy was issued for account of whom it may concern is undeniable, but whom could it concern? *Possibly the then existing or future creditors of the boat, or perhaps the constituents of Peter Hagan & Company.*"

A comparison of that construction with the decision in *Hooper* v. *Robinson, supra*, will show clearly the error of the Court of Appeals. In that case this Court held as follows:

> "A policy upon a cargo in the name of A, 'on account of whom it may concern,' or with other equivalent terms, will inure to the interest of the party for whom it was intended by A, provided he at the time of effecting the insurance had the requisite authority from such party, or *the latter subsequently adopted it. No proof is necessary that the assured had an insurable interest at that time. It is sufficient if such interest subsisted during the risk and when the loss occurred.*"

In the opinion this Court adopted the construction of the clause contained in *Phillips on Insurance* (Sec. 382 *et seq.*) as follows:

> "Sec. 382. In many policies the assured is so *described that any person may be comprehended,* and avail himself of the contract, by proving his interest and showing that the policy was intended for him."

He then quotes the different forms in use as follows, to which the foregoing statement applies:

England. "As well in his own name as in the name and names of all persons whatsoever to whom the same may in any way appertain."

United States. "The same form is often used in the United States, and also a shorter one of like import, in which the party effecting the policy is insured for 'himself and *whom it may concern.*' "

Marseilles. The form is "such person as should be thereafter named."

Hamburg. The losses are made payable "to bearer."

"Sec. 383. A policy made in the name of a particular person 'for whom it may concern,' or with any other equivalent clause, will be applied to the interests of the party or parties, and only the party or parties for whom it is intended by the person who effects or orders it, if such party has authorized its being made beforehand or subsequently adopts it.

"Sec. 384. The intention of the party who orders the policy determines who are 'concerned' under a general description; *though those intended are not known by the broker who effects the policy, or by the assurers, to be so.*

"Sec. 385. The rule that an insurance 'for whom it may concern' will avail in behalf of the party for whom it was intended, *does not mean that any specific individual must be intended.* * * * *He may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person subsequently ascertained to have an insurable interest who adopts the insurance.*

"Sec. 388. *One may become a party* to an insurance effected in his behalf, in terms applicable to his insurance, *without any previous authority from him, by adopting it, either before or after a loss has taken place* and is known to him, though the loss may have happened before the insurance was made."

Mr. Justice SWAYNE, in delivering the opinion in *Hooper* v. *Robinson*, in addition to the foregoing statement in *Phillips*

on Insurance, quotes, with approval, the following statement of the law contained in *1 Perkin's Arnould on Insurance*, p. 238:

"*It is now clearly established that an insurable interest subsisting during the risk and at the time of loss, is sufficient,* and that the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought."

The meaning of this clause, as stated in *Phillips on Insurance*, and approved by this Court, has been universally received in the commercial world, and has been always adopted by the courts, without exception, *until the decision of the Circuit Court of Appeals in this case.*

In *Henshaw* v. *The Mutual Safety Insurance Company*, 2 Blatchford 99, a policy was issued to the Norwich and Worcester Railroad Company "on account of whom it may concern," loss payable to Henshaw, the plaintiff, and others, upon the steamer "Atlantic." The plaintiffs in their declaration averred that they were, *at the time of the loss of the steamer*, interested in her to the amount of said insurance. Judge BETTS held that this was sufficient, and that *an averment that they were interested at the time the policy was issued was not necessary.*

This clause was construed by the Court of Appeals of New York in *Duncan* v. *China Mutual Ins. Co.*, 129 N. Y. 237 (1891).

O'BRIEN, J., in delivering the opinion of the court, said:

"The technical phrase 'for whom it may concern,' or any other terms of equivalent import, in such a policy will be applied to the interest of the party for whose benefit it was intended by the person who procures or orders the insurance. These terms will not carry the benefit of a policy to a risk or an interest not fairly within the contemplation of the parties to the policy (Phillips on Insurance, Sec. 383; Parsons on Marine Insurance, 45, Hooper *v.* Robinson, 98 U. S. 528; Henshaw *v.* M. S. Ins. Co. 2 Blatch. 99; Rodgers *v.* Traders Ins. Co., 6 Paige,

583). The result of this principle is that a party *who has an interest in property covered by such a policy at the time of the loss*, will be protected, without any express stipulation to that effect, *though he had no interest at the commencement of the risk*, provided he was intended to be assured. The construction that should be given to such contracts was thus stated by Judge FOLGER in Waring *v.* Indemnity Ins. Co., 45 N. Y. 612: 'Of course it must be made to appear that the owner was in the intention of the person effecting the insurance when the contract was made. Such intention need not have fastened at the time of entering into the contract upon the very person, who when the contract matures seeks to take the benefit of it * * * **and it is to be assumed that every one was in the intention of the assurer, who subsequently with design takes such relations to him as brings him within the clauses of the policy.'"**

It has also been construed in *Fire Ass'n* v. *Merchants' & Miners' Trans Co.*, 66 Md. 339 and 348 (1886), as follows, by MILLER, J.:

"Otherwise policies 'for account of whom it may concern' which are frequently taken out by and in the name of a party in possession, without any previous authority from the owner, could never have been upheld. But such policies are daily issued, and though more frequently used in marine insurance are sometimes found in other policies, *and it has become elementary law in regard to them, that extrinsic evidence may be adduced to show who was in fact the party concerned, and anyone having title to the property at the time of loss may*, by adoption of the contract, avail himself of its advantages, provided it be shown that his interest was within the contemplation of the party procuring the insurance."

The clause which is used in policies in England is of similar import (*Phillips on Insurance*, Sec. 382) and its construction is stated in *Arnould on Marine Insurance*, 112, as follows:

"The true rule, then, would appear to be, that any party to whom an interest in the property insured 'doth, may or shall appertain,' at any time during the pendency of the risk, may under the general words, by subsequent adoption take advantage of the policy to protect such interest, **unless it appears from extrinsic evidence that the person directing the policy to be effected intended at the time so to confine the insurance as not to embrace such interest."**

A true statement of the law, deduced from these authorities, is that the clause "for account of whom it may concern," is not a personal contract to indemnify a specified individual, but is rather the insurance of an interest, and anyone who acquires that interest, may avail himself of the policy by adopting it, just as Martin did in this case.

The learned Judges of the Circuit Court of Appeals, failed to note the fundamental distinction between the present insurance and that which the printed form of the policy was ntended to cover.

The printed form was that of the "standard policy", adopted in a number of States for the insurance of property on land, against loss on fire, and the clauses upon which the respondent relies are inserted for the purpose of preventing an increase of the moral hazard, by the substitution of a new owner of the property, without the consent of the underwriter.

The contract ordinarily made upon that form is *purely personal*, in which the character of the assured plays an important part, and for that reason alone, is not assignable without the consent of the underwriter.

Under policies where the clause "for account of whom it may concern," is used, the question of moral hazard is entirely eliminated, by the insurance of an interest, without reference to the ownership as the parties have no intention of making a personal contract.

The respondents in this case issued their policy to Peter Hagan & Company (*who had no interest whatever in the boat*), without having or demanding any information as to the real owner or owners. They insured a certain interest, which in this case was the entire one, for the benefit of whoever might be concerned in that interest during the life of the policy, and as Martin acquired a portion of that interest during the life of the policy, he became entitled to the benefit of the policy, merely by adoption of it.

II.

Where a policy is issued "for account of whom it may concern," the intention of the underwriter, to which the Court of Appeals seems to have considered as governing, is unimportant; it is the intention of the party who procured the policy which governs.

As is said in *Phillips on Insurance*, Sec. 384:

"The *intention of the party who orders the policy determines who are 'concerned'* under a general description; though those intended are not known by the broker who effects the policy, or by the assurers, to be so."

There is no doubt as to the intention of Hagan, who obtained the insurance, to procure a non-personal policy, covering the entire interest in the boat.

The learned Judge of the district Court, found as follows: (Rec. p. 34).

"In the present case, I have no doubt (and *I find the fact to be*) *that Hagan intended to insure, and to keep insured for one year the entire title to the boat.* He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object the policy would more naturally have been taken out in his own name omitting the qualifying phrase; but he intended to protect the ownership of the boat, whether vested in himself alone, or shared with, or transferred to other persons."

The following testimony, which is quoted because it is the only evidence upon this point, supports that finding.

The broker who procured the policy says (Rec. 34):

"*Q.* What instruction did Hagan give you as to the interest to be insured?

"*A. He told us to insure the tug 'Senator Penrose' in 'the name of Peter Hagan & Company for account of whom it may concern.*"

III.

The Court of Appeals differed from the decisions of other Courts, in assuming that they were bound to give effect to every provision in the policy, either written or printed, and to so construe them all, that standing together, they would make one complete instrument, and if necessary to bring about that result, that they were bound to disregard the ordinary rules of construction of insurance policies.

It is said in the opinion of DALLAS, J. (Rec. p. 40):

"No part of the instrument is to be rejected if it can be maintained as a whole, and in the present instance the printed provisions in question and the written words 'for account of whom it may concern' are not *irreconcilably repugnant.*"

While this is undoubtedly the proper rule of construction of contracts ordinarily, yet it is equally well settled, where a policy of insurance is written upon an inappropriate form, that printed portions, inconsistent with the character of the contract, do not modify the written clauses, but are as completely annulled as if they had been erased from the policy.

In *Dudgeon* v. *Pembroke*, 2 Appeal Cases, 284, a Lloyds form of "*voyage*" policy was filled up as a "*time*" policy on a ship. Various clauses referring to a voyage were left standing in the policy, and from this it was argued that these conditions which only applied to a voyage, but which were left standing, applied, though the policy was in terms a time policy. Judgment was entered in the Exchequer Chamber accordingly.

This was reversed in the House of Lords, and Lord PENZANCE, in recommending the reversal, said as follows:

"It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less or something more than a

time policy. **But the practice of mercantile men of writing into their printed forms the terms by which they desire to describe and limit the risk intended to be insured against without striking out the words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law to permit of any such conclusion."**

It is said in *Arnould on Marine Insurance*, page 294, as follows :

"Hence it is that in the familiar instance of words written in the margin, or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, and as controlling the sense of those parts of the printed policy to which they apply. So that by word ship, or freight, or goods, written in the margin, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are considered as narrowed in point of construction to it."

Instead therefore of considering the case upon the assumption that they *were bound to reconcile the printed and written clauses*, if possible, and that the printed forfeiture clause was not to be eliminated unless in "*plain conflict*" or the clauses were "*irreconcilably repugnant*," it is submitted that the proper question before the Court was whether the printed clause was applicable at all to the present contract of insurance of an interest, without regard to ownership, or whether it was not intended to apply only where there was an insurance of a personal interest. If it was intended to apply to the latter class of cases, then it could not in any way modify the clause "for account of whom it may concern," and the learned Court erred in attempting to reconcile the two clauses, instead of excluding from consideration the printed forfeiture clause.

But it is submitted that even accepting the test applied by the Court, its conclusion that the two clauses were not repugnant could only be reached by failing to follow the construction of the clause "for account of whom it may concern" by this Court, and also by an entire disregard of two primary rules of the construction of insurance policies, viz. (1),that the policy is to be

construed most strictly against the underwriter, and (2) that clauses of forfeiture are to be most strictly construed in favor of the assured.

The rule of construction of forfeiture clauses is so strict that it is only where no other construction is permitted that such one as produces a forfeiture will be adopted.

Hitchcock *v.* Ins. Co., 26 N. Y. 68;
Coyne *v.* Weaver, 84 N. Y. 386;
Walton *v.* Ins. Co., 116 N. Y. 317.

IV.

The conclusion of the Court of Appeals that the conveyance of a half interest to Martin, caused a forfeiture of the entire policy, and destroyed the right of Hagan to recover for the loss of the half interest which he still retained is opposed to the established law upon this subject.

Even if the conclusion of the Circuit Court of Appeals were not opposed to the clearly established law, and to the well recognized commercial usage in reference to policies issued "for account of whom it way concern;" if the case were one of first impression, the decision of the Court would draw comment upon it.

The underwriters issued their policy, to Peter Hagan and Company "(who had no interest in the tug)" without having or demanding the slightest information as to the personality of the owners. They eliminated all question of the moral risk, based upon the personal character of the owners, and until the proofs of loss were submitted, they had not the slightest knowledge who were the owners at the time of loss or at the time of the issuance of the policy.

But the Court of Appeals has held that because it then transpired that Peter Hagan was at the time of the loss only the owner of one half part, instead of the owner of the whole boat, the policy was entirely forfeited.

There was not the slightest change in the risk under the

policy, and notwithstanding the primary principle that forfeiture clauses are to be strictly construed, the Court deprived even Hagan of the indemnity for the half interest which he still owned.

This is opposed to the general rule of law, even where the contract is a *personal* one, that a forfeiture does not occur as long as an insurable interest remains.

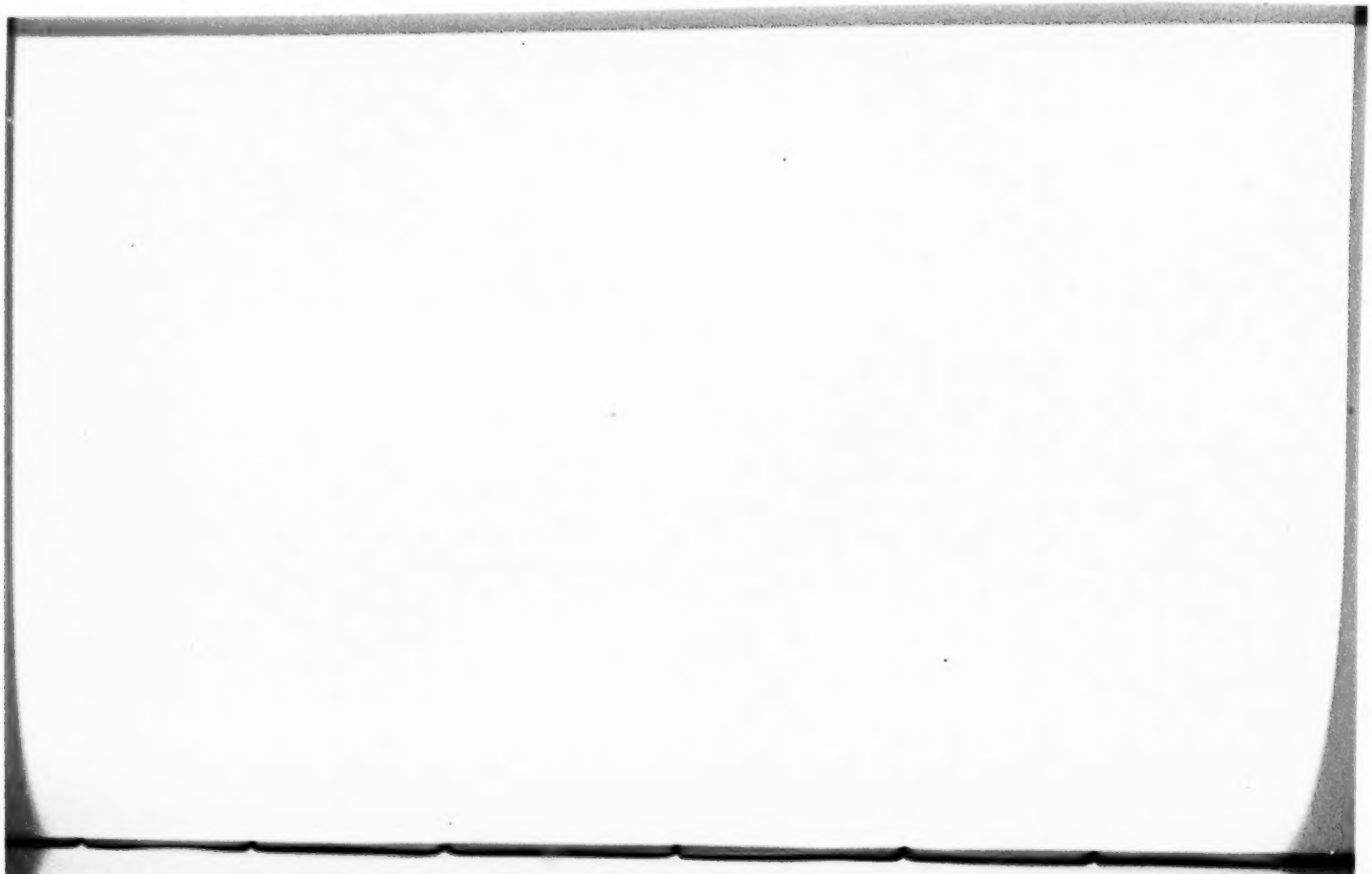
Lazarus *v.* Ins. Co., 5 Pick. 76.
Strong *v.* Ins. Co., 10 Pick. 43.
Stetson *v.* Ins. Co., 4 Mass. 330.
Jackson *v.* Gilvernail, 15 Johns. 278.
Hitchcock *v.* Ins Co., 26 N. Y. 68.
Cowan *v.* Ins. Co., 40 Iowa, 551.

In conclusion, the petitioners do most earnestly argue that the decision of the Court of Appeals ought to be reviewed, because its construction of a clause which is in universal use in the commercial world, is opposed to its construction by this Court and to that given to it in business circles. To permit this narrowed construction of the clause by the Court of Appeals to stand would only create distrust upon a subject which has always been assumed to be free from doubt.

It is submitted, therefore, that a writ of *certiorari* ought to issue, for the reasons heretofore assigned.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Counsel for Petitioners.

Bourse Building,
Philadelphia.



Supreme Court U.S.
FILED
MAR 4 1902
JAMES H. McKENNEY,
Clerk

No. 206.

Brf. of Cheyney v Lewis for Pet'rs.

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed Mar. 4, 1902.

No. 206.

PETER HAGAN AND EDWARD F. MARTIN,

Petitioners—Libellants,

vs.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

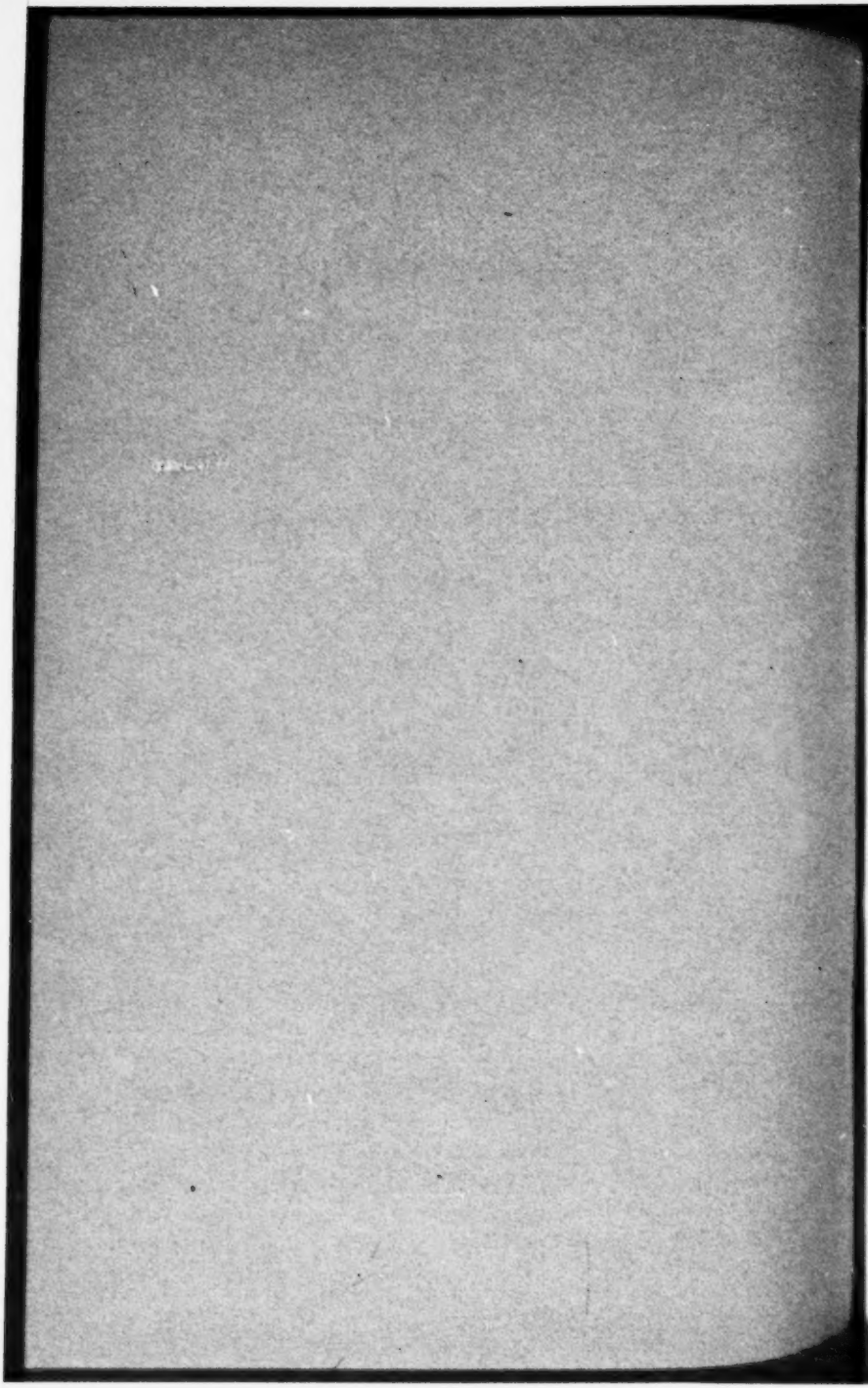
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

Brief on Behalf of Petitioners—Libellants.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel.

702 Bourse Building, Philadelphia.



STATEMENT OF THE CASE.

This case is brought here by a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

The action was commenced in the District Court of the United States for the Eastern District of Pennsylvania, upon a libel in admiralty, by Peter Hagan and Edward F. Martin, the petitioners, against the Scottish Union and National Insurance Company, to recover under a policy of insurance issued by that company against loss or damage by fire, to an amount not exceeding $2000, on the iron tug "Senator Penrose." The policy was issued November 19th, 1897, insuring "Peter Hagan & Company *for account of whom it may concern for the term of one year*" &c; and contained a clause:

> "This entire policy, *unless otherwise provided by agreement endorsed hereon or added hereto* shall be void * * * if the interest be other than unconditional and sole ownership, * * * or if any change other than by death of an insured take place in the interest, title or possession of the subject of insurance (except changes of occupants without increase of hazard) whether by legal process, or judgment, or by voluntary act of the assured, or otherwise; or if this policy be assigned before a loss, &c."

The policy is printed upon pp. 3-9 of the Record. The words "for account of whom it may concern" are in handwriting, while the whole body of the policy is in print.

When the policy was issued, the tug was owned by Peter Hagan, one of the petitioners, but upon June 14th, 1898, he sold a half interest therein, to Edward F. Martin, the other petitioner. By the terms of the sale, it was agreed that Martin should have the benefit of this insurance, and of a certain other policy issued upon the tug by the National Standard Insurance Company for the sum of $1000. No

formal assignment of either policy was made, nor was the transfer of the half interest in the tug noted thereon, because Hagan was advised by David P. Billington, the broker who had placed the insurance, that the phrase "*for account of whom it may concern for the term of one year, &c.*" rendered such action unnecessary. In fact, before advising Hagan and Martin, the broker consulted Messrs. Mather & Company, agents for one of the underwriters upon the tug and the most extensive marine insurer in Philadelphia, and found that their opinion agreed with his own. He testifies to the customary meaning of the phrase among insurance people, (Record p. 16), as follows :—

> "On the street the general understanding is, that it covers the *interest* of the owners, no matter when they acquire an interest in the property, and no matter whether at the time it is issued or subseqently."

The tug was burned July 30, 1898, proofs of loss were submitted, and the damage adjusted at $2300, by an adjuster appointed by the respondent and by the National Standard Insurance Company, whose policy upon the tug was exactly the same (Record, p. 17) as that of the respondent. The National Standard Insurance Company has paid its proportion of the total loss, one-third thereof, upon its policy of $1000, and the present proceedings were begun against respondent, the other underwriter, to recover the remaining two-thirds, the proportion of $2300, upon respondent's policy of $2000, namely, $1533,33, together with interest.

The District Court entered a decree in favor of the libellants, but the Circuit Court of Appeals for the Third Circuit reversed this decree, and dismissed the libel.

The sole question involved is the construction of respondent's policy of insurance, and especially of the words, "*for account of whom it may concern for the term of one year, &c.,*" and this question is raised by libel, answer and proofs. No testimony, however, was taken in behalf of the respondent, and the facts are not in dispute.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

2405

SPECIFICATIONS OF ERROR.

In reversing the District Court of the United States for the Eastern District of Pennsylvania, the Circuit Court of Appeals for the Third Circuit erred in the following particulars:

I. In not holding that the phrase "*for account of whom it may concern*," being in handwriting, was dominant as expressive of the intention of the parties.

II. In not holding that the *grammatical* meaning of the phrase contemplated the possibility of changes in the ownership of the tug, and brought within the terms of the contract, those who acquired an insurable interest therein during the life of the policy.

III. In not holding that the *legal* meaning of the phrase, as this Court has decided, is consistent alone with the grammatical meaning.

IV. In not holding that the *customary* and accepted meaning of the phrase, *among insurance men*, is the same as its grammatical and legal meaning.

V. In not holding that when a policy of insurance is ambiguous, that construction is taken which is against the underwriter.

VI. In not holding that a policy should never be forfeited except in a clear case.

VII. And finally, in reversing the District Court and dismissing the Libel.

H. L. CHEYNEY,
JOHN F. LEWIS,
For Petitioners.

ARGUMENT.

I. The phrase "for account of whom it may concern" is in writing.

II. Its grammatical meaning contemplates the "possibility" of changes in ownership, and includes those who acquire an insurable interest in the tug during the life of the policy.

III. Its legal meaning, as this Court has decided, is consistent with its grammatical meaning.

IV. Its customary and accepted meaning among insurance men, is the same as its grammatical and legal meaning.

V. When a policy of insurance is ambiguous, that construction is taken which is against the underwriter.

VI. A policy should never be forfeited except in a clear case.

FIRST POINT.

The only defense made to the payment of petitioners' claim is that set out in the eighth paragraph of the answer (Record, p. 11):

> "That the libellants have not performed all things on their part to be performed by the terms of the insurance, in that no notice was given of the change of ownership or of the interest in said tug by the respective libellants, as required by the terms of the policy."

Respondent contends that by reason of the sale of a half interest in the tug the policy is void. No allegation is made that the sale of a half interest prejudiced the respondent in the slightest, nor that it had aught to do with the damage by fire to the tug, but the mere fact "that no notice was given

2405

of the change," is relied upon as working an absolute forfeiture of the policy, not only as against Martin, but as against Hagan also. The policy, however, contains no clause requiring *notice* of change of ownership, and respondent is, therefore, without other defense than the mere *fact* of Hagan's sale of one-half of the tugboat, without any increase in the interest insured or in the perils to which it was exposed during the life of the policy.

Petitioners contend that the written words "*for account of whom it may concern,*" are controlling as an expression of the intention of the parties, and overcome inconsistent printed provisions; that the policy was a *non-personal* contract, insuring the *interest* represented by the ownership of the whole tug as *property*, and that any person who became entitled to participate in that interest or ownership, during the life of the policy, might avail himself of its benefits by adopting it, provided the intention of the person procuring the policy was to insure the whole interest or property in favor of any person who might be concerned therein. Respondent contends, upon the other hand, that notwithstanding the phrase "*may* concern," those alone *are* concerned who owned in the tug *at the time* the insurance was effected, and no others.

1. The words "for acconnt of whom it may concern" are in writing, and therefore controlling, as expressive of the intention of the parties."

The body of the policy is that of the Standard Fire Insurance Form in use in the States of New York, North Dakota, New Jersey, North Carolina, South Dakota, Connecticut and Rhode Island, and is in *print*, and the learned Judge of the District Court, in sustaining the libel, says (Record, p. 22):

> "The decision of the case depends upon the effect to be given to the words, '*for account of whom it may concern.*' This clause, so far as it may be in conflict with

other language in the policy, must, upon familiar principles, be regarded as dominant. It expresses the special agreement of the policy for it is in writing, while the conflicting provisions are in print, and general printed conditions usually give way to deliberately chosen written words."

Certainly, the learned Judge is correct in giving such effect to a written clause in a policy of insurance, as against a printed one.

The rule as stated by Lord ELLENBOROUGH in *Robertson v French*, 4 East., 130, has never been questioned :

> "If there is any doubt about the sense or meaning of the whole, **the words superadded in writing are entitled to have greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning."**

In *Parsons on Marine Insurance*, page 65, it is said :

> "All our policies are in part printed and in part written. What is printed is supposed to belong to all policies, or at least to all the policies issued by the underwriters who use that form. **What is written expresses the particulars of that individual bargain. From this follows one obvious rule ; that if what is written conflicts with what is printed, it controls what is printed. The reason is obvious ; for what is written contains the particulars of that very contract, and may be supposed to come under especial consideration."**

Inconsistent written and printed clauses are exceedingly common in policies of insurance and especially in marine policies. No written contracts appear to be drawn with less care (*Parsons on Marine Iusurance*, p. 64), and it often happens that "time" policies are written on "voyage" forms,

and vice versa; that "freight" policies are written on "cargo" forms; and that marine insurance is often contracted for on forms intended for "buildings" or "household goods." Indeed, the policy in question seems, as far as its printed form goes, to be of such a character, and to contain clauses entirely inapplicable, if not inconsistent, with fire insurance upon a tugboat.

The policy insures (Record p. 4) "the following described property while *located and contained as described herein and not elsewhere*," manifestly contemplating insurance upon "goods" in a certain fixed locality, and that they are not to be moved therefrom except upon penalty of forfeiture, and yet the very next clause, which is typewritten and pasted to the printed form, authorizes the tugboat to "engage in such employment as may be incidental to her trade," which would require her to traverse the entire length of the Delaware river and bay, and possibly go to sea to reach neighboring ports.

Again, the policy gives the tugboat the privilege "*to lay up*," and yet seems to provide (Record p. 5), that the policy shall be void, if, "it (apparently the tugboat) ceases to be operated for more than ten consecutive days;" and again, authority is given, "*to undergo alterations and repairs*," and yet the policy subsequently provides (Record p. 5), that the insurance shall be void, if "mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time;" and apparently also, if the tugboat should be "operated in whole or in part at night later than ten o'clock." Many other provisions refer to "the building," and fire originating "in neighboring premises;" and the underwriter is authorized "to take all or any part of the *articles*" at the appraised value; and finally the assured, notwithstanding the fact that the tugboat might be on the voyage at the time, is required to furnish a certificate of the notary living nearest the place of fire, that the loss has been honestly sustained!

2. The clauses relied upon by the Libellants and the Respondent are directly antagonistic.

That upon which the Respondent stands, renders the policy void upon a change of interest, without notice and consent of the assured; while that upon which the Libellants base their claim, manifestly insures unknown persons, provided the interest insured concerned them.

Inconsistent printed portions of the form used, do not merely modify the written clauses, but are as completely annulled as if they had been erased from the policy.

In the case of *Dudgeon* v. *Pembroke*, 2 Appeal Cases, 284, a Lloyds form of "voyage" policy was filled up as a "time" policy on a ship. Various clauses referring to an intended voyage were left in the policy, and from this it was argued, that these conditions applied, though the policy was in terms a time policy. Judgment was entered in the Exchequer Chamber accordingly.

This was reversed in the House of Lords, and Lord PENZANCE, in recommending the reversal, said:

> "It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less or something more than a time policy. **But the practice of mercantile men of writing into their printed forms, the terms by which they desire to describe and limit the risk intended to be insured against, without striking out the words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law, to permit of any such conclusions."**

It is said in *Arnould on Marine Insurance*, page 294:

> "Hence it is that in the familiar instance of words written in the margin or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, **and as controlling the sense of those parts of the printed policy to which they apply.** So that by the word "ship," or "freight," or "goods,"

written in the margin, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are considered as narrowed in point of construction to it."

See *Egbert* v. *St. Paul Fire and Marine Ins. Co.*, 71 Fed., 741.

Policies of insurance, like all other contracts, are to be so construed as to give effect to the intention of the parties, as ascertained by the general scope and purpose of the entire contract.

What was the purpose and intention of the parties as expressed in this policy? Undoubtedly it was to insure a certain *boat* against loss by fire, in favor of persons whose identity was not disclosed. The ownership of the boat is absolutely immaterial. The underwriter did not even inquire who the owner was when the policy was issued, but according to its express terms insured whomsoever was concerned therein during the period of a year, and the underwriter's own estimate of the materiality of the personal hazard involved, is apparent from the phrase "*for account of whom it may concern.*"

The clearly expressed intention of the parties, as shown by their immediate written language, was to cast aside any consideration of moral hazard, and to make the contract a *non-personal* one, covering the subject of the insurance. The general printed clauses do not express that intention, but are applicable to an entirely different contract, that is, a *personal* contract, involving the moral risk. That the printed words were not actually struck out of the policy, is unimportant. The insertion of the written clause is equally effective, rendering them inapplicable to this contract.

3. In this case there has been no increase of risk whatever.

If Hagan had retained his entire interest to the time of the loss, the claim against the company would have been

exactly the same as that now made. It would have been for a loss of the whole of the boat, just as it is at present.

Certainly the law will not look with favor upon an underwriter, who receives and retains a premium, and then tries to evade the payment of a loss, on the ground that the policy has become void by a change of interest which has not increased his risk in the slightest, and especially when he never asked the names of the persons to be insured, but agreed to insure those unknown to him.

The learned Judge of the Circuit Court of Appeals, in reversing the District Court, admits that written words in a policy are dominant, but reaches, what is submitted to be a conclusion in manifest conflict with the terms of the policy itself, when he finds that the written and the printed clauses are not inconsistent. He says (Record, p. 28):

> "It is true that the written terms of a policy will control where they are in plain conflict with its printed clauses, but no part of the instrument is to be rejected, if it can be sustained as a whole, and in the present instance the printed provisions in question and the written words '*for account of whom it may concern*,' are not irreconcilably repugnant. That the policy was issued for account of whom it may concern is undeniable, but whom could it concern?"

Though the learned Judge asks this question, he finds it, upon his construction of the policy, exceedingly difficult to answer. The parties themselves, who went to the trouble of writing the words "*for account of whom it may concern*," must certainly have intended that the policy, with those words in, was to have a different meaning, from the policy without them, and yet the conclusion of the Circuit Court of Appeals is, in effect, that the words are meaningless.

After asking the question, "Whom could it concern?" the learned Judge undertakes to make answer:

> "Possibly, the then existing or future creditors of the boat, or, perhaps, the constituents of Peter Hagan & Company."

but the answer he gives to his own question, is entirely insufficient, because the firm's "*constituents*," were already covered by the words "Peter Hagan *& Company*," and the "*then existing or future creditors* of the boat," could not possibly be within the protection of the policy. There is no evidence that there were any existing creditors, or the likelihood of future ones, or that either party had the slightest intention of doing so unusual a thing, as the learned Judge suggests, namely, insuring *creditors*. Men do not often insure those they *owe*, but rather look out for themselves. Besides, the terms of the policy, upon the very construction put upon it by the learned Judge himself, would become absolutely void, if the interest of the insured was other "than *unconditional* ownership" (Record, p. 5); or if any change took place in the interest "*whether by legal process or judgment or by voluntary act of the insured or otherwise*," and exactly how any lien creditor of the boat, the only kind of a creditor who could have any insurable interest in her, could derive benefit from the policy, or how the learned Judge reconciles the answer he gives to his question, with his own conclusion of the meaning of the policy, is impossible to imagine.

4. The policy itself contemplated that the parties might agree upon special terms inconsistent with its printed provisions.

The very clause Respondent relies on (Record pp. 4–5), providing for the avoidance of the policy under the conditions therein named, says :—

> "This entire policy, *unless otherwise provided by agreement endorsed hereon or added hereto*, shall be void, etc."

And the use of the phrase "*for account of whom it may concern*," as written in the policy, is certainly to be taken as a waiver of any provision of the policy inconsistent therewith.

The parties "*otherwise provided*," by inserting this written clause, which not only does not disclose who the actual owners of the tugboat are, but also expressly contemplates the possibility of changes of ownership during the life of the policy, and notwithstanding which its obligation was to continue.

The Circuit Court of Appeals have ignored a very important fact, expressly found by the District Court (Record, p. 23):

> "In the present case, I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object, the policy would more naturally have been taken out in his own name, omitting the qualifying phrase; but he intended to protect the ownership of the boat, whether vested in himself alone, or shared with, or transferred to, other persons. This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists."

SECOND POINT.

The grammatical meaning of the phrase "for whom it may concern for the term of one year, etc.," is inconsistent with Respondent's position.

The words "*may concern*" are in the potential mood, and affirm "possibility with respect to that which is future," or as the Century Dictionary says in reference to the word "*may*," "*indicate possibility with contingency.*" If the only persons insured by the policy, were those directly interested *at the time it was executed*, as respondent contends, the phrase should have been "for account of whom it *does* concern," or "*for whom it concerns*," and there was no necessity for using a phrase

24063

which pre-supposed the "possibility" that a "contingency" would arise, when others *might* be concerned in the policy with Hagan, or indeed, might be alone interested therein. The phrase "for whom it may concern," was used in connection with the phrase "*for the term of one year* from the nineteenth day of November, 1897," etc. No comma separated the two phrases, and the *future* reference of the clause, when read in connection with the term during which it was to operate, becomes unmistakably apparent. The grammatical meaning is nothing else, than that the policy enures to the benfit of Peter Hagan & Company and any one concerned therein during the period of one year from the date named.

THIRD POINT.

The legal meaning of the phrase "for account of whom it may concern," covers those owning the thing insured at the time the policy is executed, and those who may acquire an interest thereunder, by the subsequent adoption of the policy.

Before considering the authorities upon this point, attention is directed to some distinctions between the ordinary policy, insuring against loss to property on land, and marine policies like the one issued in this case.

Generally the former is a personal contract. It is personal because of the moral, as well as the physical hazards, involved and by reason of the moral risk, such policies are not generally assignable without the consent of the underwriter. If they were so assignable, then the risk might be increased without the underwriter's consent or knowledge. In marine policies, issued "for account of whom it may concern," or where similar clauses are inserted, the assured is not designated, and the element of moral hazard is eliminated by the act of the assurer, in agreeing to indemnify *unknown*

persons. This feature is common in marine policies, and the greater risk is fully considered in fixing the premiums.

Buck v. *Chesapeake Ins. Co.*, 1 Peters, 151.

Insuring unknown persons has grown out of the peculiar character of the property involved. The insurable interests in marine property, are subject to such frequent changes, that it is almost impossible, at times, to specify who are the real parties. It has also partly grown out of the popular and legal conception of marine interests, by which a vessel is regarded as an actor.

The insurance under such policies is really upon the *goods or interest.* This idea is so common, that it is contended by recognized authorities upon insurance, that in such cases the policy is as freely assignable as a bill of lading.

Phillips on Insurance, Sec. 76.
Duer on Marine Insurance, Vol. 2, p. 51, note.

In *Phillips on Insurance* it is said:

> "Sec. 382. In many policies, the assured is so *described that any person may be comprehended* and avail himself of the contract, by proving his interest and showing that the policy was intended for him."

Mr. Phillips then quotes different forms in use, to which his statement applies:

England. "As well in his own name, as in the name and names of all persons whatsoever to whom the same may in any way appertain."

United States. "The same form is often used in the United States, and also a shorter one of like import, in which the party effecting the policy is insured 'for himself and whom it may concern.'"

Marseilles. The form is, "Such person as should be thereafter named."

Hamburg. The losses are made payable "to bearer."

Mr. Phillips continues, and his statement of the law is approved in *Hooper* v. *Robinson*, 98 U. S., 528, (*infra.*)

> "Sec. 383. A policy made in the name of a particular person 'for whom it may concern,' or with any other equivalent clause, will be applied to the interests of the party or parties, and only the party or parties, for whom it is intended by the person who effects or orders it, if such party has authorized its being made before hand, or subsequently adopts it.
>
> "Sec. 384. The intention of the party who orders the policy, determines who are 'concerned,' under a general description, though those intended are not known by the broker who effects the policy, or by the assurers, to be so.
>
> "Sec. 385. The rule that an insurance 'for whom it may concern' will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended. * * * He may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person, subsequently ascertained to have an insurable interest, who adopts the insurance.
>
> "Sec. 388. One may become a party to an insurance effected in his behalf, in terms applicable to his insurance, without any previous authority from him, by adopting it, either before or after a loss has taken place and is known to him, though the loss may have happened before the insurance was made."

The first time that the phrase "*for whom it may concern*," as used in a policy of insurance, came before this Court, was in *Buck & Hedrick* v. *The Chesapeake Insurance Company*, 1 Peters' Reports, p. 151. That case differs from this, because the construction of the words was directed simply towards determining whether the property of a belligerent was covered by the policy, but in the argument before the Court and in the opinion, a meaning is given to the phrase, which seems quite inconsistent with Respondent's position. Two policies were issued on the cargo of the brig "Columbia," insuring

Buck & Hedrick, "*for whom it may concern*," and containing the usual clause that the perils insured against, were "of the seas, men-of-war, fire, enemies, &c." In the applications which were made for the insurance, the particulars were fully stated, but no warranty given that the risk assumed was a peace risk. In a letter of April 27, by virtue of which the insurance was applied for, the policy was asked, seemingly, in behalf alone of Daniel Fitch, who was the master of the "Columbia."

Counsel for plaintiff argued, that the use of the phrase " for whom it may concern " relieved the plaintiffs from disclosing the parties intended to be insured, either at the time of effecting the insurance, or at any other time, and that a policy so worded, "covers all possible persons and all possible interests, belligerent as well as neutral."

Mr. Justice JOHNSON, in delivering the opinion of the Court, held that the terms of the policy were broad enough, to cover not only the undoubted interest of the master of the brig, but also the interest of a certain merchant, who was a Spanish subject of Porto Rico, and at that time, affected with the character of a belligerent.

The opinion says :

> " That a policy 'for whom it may concern,' will in ordinary cases, cover belligerent property has been fully conceded in argument. Nor is it contested, that previous representations will be sunk or absorbed, or put out of the contract, where the policy is executed in obvious inconsistency with those representations. But the ground here insisted on for defendants, is, that the letter of April 27th, was a representation that the whole cargo was *Captain Fitch's*, and that it thereby operated as an imposition upon the underwriters, and as such, avoids both policies; or that it affixes a conventional meaning to the phrase, in these policies, which limit its ordinary import.
>
> Is there unything in the case sufficient to except these policies from the ordinary import and effect of the phase 'for whom it may concern?'
>
> We are of opinion there is not."

The learned Judge further says:

> **"The defendants had a right to make what inquiries they pleased, as to the real character of the cargo, and if they did not make those inquiries, the law imputes to them the use of the phrase, 'for whom it may concern,' in its ordinary effect and signification."**

While the decision fails to cover the exact point now to be decided, it certainly is of value, as showing the breadth of meaning, which this Court has attached to the phrase in question.

In *Insurance Company* v. *Chase*, 5 Wall., p. 509, the defense was want of insurable interest, and it was argued that the party effecting the insurance, had done so without the authority of his fellow trustees. Mr Justice DAVIS in delivering the opinion, says, p. 514:

> "If (a Trustee insures) without authority, still it is a valid contract, which the underwriter cannot dispute, if his co-trustees subsequently ratify it. *Blanchard* v. *Waite*, 28 Maine, 57. In fact, so liberal is the rule on this subject, that where a part owner of a property effects insurance for himself and others, without previous authority, the act is sufficiently ratified, where suit is brought on the policy in their names. *Finney* v. *The Fair Haven Insurance Company*, 5 Metcalf, p. 192."

In *Hooper* v. *Robinson*, 98 U. S. Reports, p. 528, the question now before the Court was raised and determined, and while the facts were essentially different from those shown by this record, they were sufficiently analogous to make the Court's decision of controlling weight.

The policy of insurance was to "James Hooper & Company *on account of whom it may concern*, in case of loss to be paid to their order," the insurance being "on merchandise, to cover such risks as are approved and endorsed on the policy." The endorsements set forth the name of the vessel, the voyage, the premium, the amount of insurance and the remark,

"paid advance to cover disbursements and repairs." The instrument was a cargo policy. Hooper was agent for a British steamship, which had come to Baltimore consigned to him, and which after having taken on board her return cargo, had been injured by a collision with another vessel and had to put back to Baltimore for repairs. He paid her repair bills and other disbursements, and the captain drew a draft on Good Brothers of Hull, England, for the necessary amount, in favor of Hooper, and directed Hooper to protect the drawees by insurance. The policy in question was intended for that purpose.

The draft was bought by Baltimore bankers, and sent to their correspondents in London, where it was accepted by Good Brothers and subsequently paid. The steamship upon her outward voyage, however, foundered at sea, and Hooper & Company collected the insurance and remitted to Good Brothers. The suit was brought to recover the money back from Hooper, upon the ground that he was without insurable interest; and that when the insurance was effected, there was no evidence that Good Brothers had authorized the master to draw on them, or even knew that he intended so to do, or were under any obligation to accept or pay the bill; and that they therefore had no insurable interest in the premises. Among the disbursements for which the draft was drawn, was a charge for the insurance.

It was argued in behalf of Hooper, that the phrase "*for whom it may concern*," covered every insurable interest, "even an inchoate and contingent one," and that the policy enured to the benefit of anyone having an insurable interest, either at the time the policy was executed, or whose interest was subsequently ascertained by an adoption of the insurance, and that it was quite immaterial, whether the person intended to be protected, authorized the insurance in the first instance, or subsequently adopted it. Upon the part of the underwriter, however, it was argued that the phrase in question, protected only those who had an insurable interest *at the*

2406

date of the policy and at the time of the loss. The opinion of the Court was delivered by Mr. Justice SWAYNE:

> "A policy like the one here in question, in the name of a specified party, '*on account of whom it may concern*,' or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. *I. Phillips on Ins.*, Sect. 383.
>
> This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. *Id.*, Sect. 384.
>
> One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. *Id.*, Sect. 388.
>
> The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient.
>
> It is now clearly established, that an insurable interest, subsisting during the risk and at the time of the loss, is sufficient, and that the assured need not also allege or prove, that he was interested at the time of effecting the policy; indeed it is every day practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Perkin's Arnould, 238.

Or as the syllabus of the case (presumably by the Court) puts it succinctly:

> "A policy upon a cargo in the name of A, '*on account of whom it may concern*,' or with other equivalent terms, will inure to the interest of the party for whom it was intended by A, provided he, at the time of effecting the insurance, had the requisite authority from such party, or the latter subsequently adopted it. No proof is necessary that the assured had an insurable interest at that time. It is sufficient if such interest subsisted *during the risk and when the loss occurred.*"

The following authorities are also cited as bearing upon the question at issue.

Henshaw v. *The Mutual Safety Insurance Company*, 2d Blatch., p. 99, was a suit on a policy of marine insurance, insuring the Norwich & Worcester Railroad Company "*on account of whom it might concern*," loss payable to Henshaw, from the 15th of August. 1846, to the 15th of August, 1847, upon the steamer, "Atlantic," each passage subject to its own average. Henshaw alleged that at the time of the *loss* of the steamer he was interested in her to the amount of the insurance, while the underwriter defended upon the ground, that Henshaw was not interested at the time of the *insurance*, or "at the time of the *commencement* of the risk under the policy."

The case was heard before Judges NELSON and BETTS of the Southern District of New York, and the opinion of the Court was delivered by the latter. After stating that the defense was based upon the plaintiff's want of interest in the subject matter of the insurance at the time the policy was executed and when it was to take effect, he says :

> "We consider these points in the construction of policies of insurance to be incontestably settled. First, they are to have a liberal and benign interpretation in behalf of the insured; Second, they are to be construed, and enforced according to the plain intent of the parties, if no settled rule of law interposes to prevent; Third, whether or not, by the general rules of insurance law, the fact that the insured party had no insurable interest in the subject insured at the time it was intended the contract should commence its operation, although he possessed such interest at the time of the loss, would render the policy invalid, yet clearly it is competent for the parties to contract with a view to such a condition of things. (3 *Kent's Comm.* 258, 6th ed.; 1 *Duer on Ins.*, 159, 160, note 1; *Rogers* v. *Traders' Ins. Co.*, 6 Paige, 583,596.) There is, however, strong color at least for the doctrine, that the party intended to be insured will be protected, if he had an interest at the time of the loss without any express stipulation to that effect, although he had no interest at the commencement of the risk.

(*Hughes on Ins.*, 42; 2 *Duer on Ins.*, 49, Sec. 31; *Sutherland* v. *Pratt*, 11 Mee. & W. 296; *Hancox* v. *Fishing Ins. Co.*, 3 Sumn., 132, 140, 142)."

The learned Judge continues, and his language seems especially pertinent to the facts now before the Court:—

> "It was a time policy on a steam vessel, for a succession of voyages, each voyage to bear its own average. It was made at the instance of the Norwich and Worcester Railroad Company, *on account of whom it might concern*, the loss payable to the plaintiffs, and the interest was vested in them when the loss occurred. (*Aldrich* v. *Equitable Ins. Co.*, 1 Woodb. & M., 272,276; 1 *Duer on Ins.*, 160, note 1.) Upon the statement of the contract, set forth in the declaration, we think that no stronger form of stipulation can be necessary, to render it palpable, that the underwriters intended by their agreement, **to insure all the interest, to the extent of $15,000, which should be owned in the vessel at the time of her loss within the policy, and to pay the loss to the plaintiffs, for the benefit of the actual owners.**"

He further says, as to the manifest advantage of policies payable to *any person* concerned in the property insured:—

> "This is the ordinary and, perhaps, the most serviceable class of insurances. Cargoes can be purchased and laden from port to port, on trading voyages, under the protection of policies already in existence, without waiting for the means of obtaining satisfactory insurance after the interest is acquired. **The same principle applies to the changeable proprietorships of vessels; and we have no difficulty in expounding the present policy, as contemplating a succession of ownerships in the steamer, and as intended by the underwriters to cover the interest in the vessel, in whomsoever it might be vested when a loss should occur.**"

The exact phrase now in question was construed by the Court of Appeals of New York, in *Duncan* v. *China Mutual Ins. Co.*, 129 N. Y., 237 (1891).

O'BRIEN, *J.*, in delivering the opinion, said:

"The technical phrase '*for whom it may concern*,' or any other terms of equivalent import, in such a policy, will be applied to the interest of the party for whose benefit it was intended by the person who procures or orders the insurance. These terms will not carry the benefit of a policy to a risk or an interest not fairly within the contemplation of the parties to the policy (Phillips on Insurance, Sec. 283; Parsons on Marine Insurance, 45; Hooper *v.* Robinson, 98 U. S., 528; Henshaw *v.* M. S. Ins. Co., 2 Blatch., 99; Rogers *v.* Traders' Ins. Co., 6 Paige, 583.) The result of this principle is, that a party *who has an interest in property covered by such a policy at the time of the loss*, will be protected, without any express stipulation to that effect, *though he had no interest at the commencement of the risk*, provided he was intended to be assured. The construction that should be given to such contracts, was thus stated by Judge FOLGER in Waring *v.* Indemnity Ins. Co., 45 N. Y., 612; 'Of course it must be made to appear, that the owner was in the intention of the person effecting the insurance when the contract was made. **Such intention need not have fastened at the time of entering into the contract upon the very person who, when the contract matures, seeks to take the benefit of it * * * and it is to be assumed that every one was in the intention of the assurer, who subsequently, with design, takes such relations to him as brings him within the clauses of the policy. The intention must have been to effect insurance, for any and all persons, who during the running of the policy, should have goods within the description of the policy.'**"

It has also been construed in *Fire Ass'n* v. *Merchants' & Miners' Trans. Co.*, 66 Md., 339 and 348 (1886), as follows, MILLER, J.:

"Otherwise policies 'for account of whom it may concern,' which are frequently taken out, by and in the name of a party in possession, without any previous authority from the owner, could never have been upheld. But such policies are daily issued, and though more frequently used in marine insurance, are sometimes found in

24068

other policies, **and it has become elementary law in regard to them, that extrinsic evidence may be induced to show, who was in fact the party concerned, and any one having title to the property at the time of the loss may,** by adoption of the contract, avail himself of its advantages, provided it be shown that his interest was within the contemplation of the party procuring the insurance."

The clause which is used in policies in England, is of similar import (*Phillips on Insurance*, Sec. 382), and its construction is stated in *Arnould on Marine Insurance*, 112, as follows:

> "The true rule, then, would appear to be, that any party to whom an interest in the property insured 'doth, may or shall appertain,' at any time during the pendency of the risk, may, under the general words, by subsequent adoption, take advantage of the policy to protect such interest, unless it appears from extrinsic evidence, that the person directing the policy to be effected, intended at the time, so to confine the insurance, as not to embrace such interest."

FOURTH POINT.

The trade meaning of the phrase agrees with its grammatical and legal meaning.

The testimony of Mr. Billington, the insurance broker, upon this point, Record p. 16, is uncontradicted. He says:

> "On the street the general understanding is, that it covers the interest of the owners, no matter when they acquire an interest in the property, and no matter whether at the time it is issued or subsequently."

and he says that when he told Hagan and Martin, that the phrase covered the latter, after Hagan's sale of one-half interest in the tug:

> "I was simply following out the custom I had been taught, and as it was the custom of the street."

Evidence is clearly admissible to show the established trade meaning of this clause.

The law is thus stated in *Joyce on Insurance*, Sec. 217 :

> "Where a word has acquired by usage in trade or commerce a meaning peculiar thereto, * * * or where it appears from the context that the words are used in a particular sense to compass the intent of the parties, such meaning may be shown by proper evidence, and the exact technical or commercial meaning will govern."

The law is similarly stated in *Greenleaf on Evidence*, (15th Ed.), Sec. 292 ; *Arnould on Marine Ins.*, p. 275 ; *Richards on Insurance*, p. 52.

In *Arnould on Marine Insurance*, it is said, p. 287 (MacLachan's Edition) :—

> "Where the sense of the words and expressions used in a policy, is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage, their meaning in the given case."
>
> "The words and phrases employed in policies may be obscure in themselves, as when they are entirely technical aud local, so as, without explanation, to be quite unintelligible to the generality of persons ; in this case, their ambiguity of meaning appears, upon merely reading them, as they stated in the instrument ; it is patent on the face of it. Again, the words employed may have an ordinary meaning, intelligible to people in general, without reference to any particular business, yet, if they also have another meaning peculiar to a particular business, and the circumstances of the case show, that such secondary or less general sense, is that in which they are used in the instrument of which the meaning is to be ascertained, parol evidence may be resorted to in this case also, to explain the real meaning of the contract, by showing the sense in which the parties to it employed their words."

24069

He then proceeds to cite the following among other instances :—

In *Mason* v. *Skurray*, 1 Park Ins., 245, parol testimony was admitted to show that the term "corn," was meant to comprehend every sort of grain and also beans and peas,

In *Moody* v. *Surridge*, 1 Park Ins., 245, the same evidence was admitted to show that the same term included malt.

In *Coit* v. *Commercial Ins. Co.*, 7 Johnson (N. Y.), 385, evidence of mercantile men, was admitted to show that the word "roots" contained in a policy, was confined in its application to perishable roots, such as beets and other garden roots, and did not apply to sarsaparilla, a dry hard root.

In *Astor* v. *Union Ins. Co.*, 7 Cowan, 202, evidence was admitted to prove that the word "skins," did not include bear skins having fur on them.

In *Parr* v. *Anderson*, 6 East., 202, a vessel was insured "either with or without letters of mark." Evidence was admitted to show, whether these words gave the vessel the right to chase, for the purpose of attack and capture, or whether they were confined to leave to employ force for the purpose of defense only.

In *Robertson* v *Clark*, 1 Bing. 445, the voyage was stated in the policy to be "from Van Diemen's Land to a port or ports of loading in India and the Indian Islands." The Court held that although amongst geographers, Mauritius was deemed an African island, yet parol evidence was admissible to prove that in commercial language it passed for an Indian island.

In *Houghton* v. *Gilbart*, 7 C. & P., 701, TINDALL, *C. J.*, held that the word "cargo" was a term of mercantile import

and its sense, as used in a policy, was a question for the jury, and could not be decided by the dictionary definition.

In *Peich* v. *Dickson*, 1 Mass., 10, Judge STORY admitted evidence to show the meaning of the word "freight," used in a policy, on the ground that it was a word, which in commercial parlance, had different meanings.

Mr. Billington's evidence did not vary or contradict the terms of the written instrument, but interpreted those terms and made them certain. It simply interpreted that which was otherwise obscure. The opinion of the Circuit Court of Appeals utterly ignores this evidence, while it is certainly entitled to consideration, if the real and legal intention of the parties, is the thing to be discovered.

In the *Barnstable*, 84 Fed., p. 895, a decision by Judge BROWN, sitting in the District Court for the District of Massachusetts, and which was affirmed by the Circuit Court of Appeals in 94 Fed., p. 213, a charter party contained a clause: "The owner shall pay for the insurance on the vessel." The evidence was offered of the broker who negotiated the charter for the owner, that this meant "all insurance on the vessel in any way, shape or manner against stranding, collision and everything, as is usually done in all vessels."

Its inadmissibility was urged, but the Court admitted it.

> "It did not vary, add to, or contradict the writing, but only interpreted and made certain its terms." *Lonergan* v. *Buford*, 148 U. S., 581,588, 13 Sup. Ct., 684. "If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case, and of statements made by any party to the document, as to his intentions in reference to the matter to which the document relates." 7 *Am. and Eng. Enc. Law*, 93.

The case of *Lonergan* v. *Buford*, 148 U. S., p. 581, involved the construction of a contract for the sale of all the

2407

cattle on certain ranches, except two thousand steers, reserved in order to fulfill a previous contract, and the Court held, Mr. Justice BREWER, delivering the opinion, that there was no error in admitting evidence in reference to the ages of the steers which the defendants had sold under the first contract, and which were to be excepted from the second, because such testimony did not vary or contradict the terms of the writing, but simply identified the property which was to pass thereunder.

FIFTH POINT.

When a policy is ambiguous, that construction should be taken which is against the underwriter.

The American courts have invariably adopted the rule, that as a policy of insurance is a contract of indemnity, prepared and signed by the underwriter, the construction in doubtful cases must be against him, where he has received the premium, and defends, after a loss and a claim against him for the indemnity he agreed to provide.

In *Insurance Company* v. *Wright*, 1 Wall., p. 456, when a marine policy was before the Court for construction, Mr. Justice MILLER said:

> "The policy is signed by the company and not by the plaintiff. All its promises are made by the company in its own language. All its exceptions and reservations are those of the company. The rule is that when in such cases the language requires construction, it shall be taken most strongly against the party making the instrument."

In *Nat. Bank* v. *Ins. Co.*, 95 U. S. A., 679, Mr. Justice HARLAN, in applying this rule said:

> "The company cannot complain of such a rule. Its

attorneys, agents or officers prepare the policy. It is its own language which the court is invited to interpret, and it is both reasonable and just, that its own words should be construed most strongly against itself."

All ambiguities and obscurities in a policy of insurance are to be resolved against the underwriter, and therefore the word "effected" in an accident policy, will not, in order to relieve the insurer, be read "affected," although the word be meaningless as written. *Commercial Traders' Association* v. *Fulton*, 79 Fed., affirmed in the Circuit Court of Appeals, 93 Fed., p. 621.

A policy of insurance, where there is doubt as to its meaning, should be construed most strongly against the insurer.

Phenix Insurance Company v. *Willcox & Gibbs Company*, 65 Fed., p. 724; 13 C. C. A., p. 88.

Ambiguous provisions in a policy of insurance must be construed most favorably to the insured. *McMasters* v. *New York Life Insurance Company*, 78 Fed., p. 33; affirmed in 90 Fed., p. 40.

The general rule is, that when a stipulation or exception in a policy of insurance is susceptible of two meanings, that meaning is to be adopted, which is most favorable to the assured.

Nat. Bank v. *Ins. Co.*, 95 U. S., 679; *Hoffmann* v. *Ætna Ins. Co.*, 32 N. Y., 405; *Rann* v. *Ins. Co.*, 50 N. Y., 389; *Allen* v. *Ins. Co.*, 85 N. Y., 473; *Ins. Co.*, v. *Croffer*, 32 Pa., 351; *Franklin Ins. Co.*, v. *Updegraff*, 43 Pa., 350; *Franklin Ins. Co.* v. *Brock*, 57 Pa., 74.

SIXTH POINT.

A policy of insurance should never be forfeited after a loss except in a clear case.

In *Phillips on Insurance*, Sec. 107, it is said:

> "A restriction in a policy that it shall become void by assignment without the consent of the underwriters, is not void as an unlawful restraint upon the transfer of property, but it is to be strictly construed. * * *
>
> "As to the rule of strict construction of this clause, it can only be applied on principles which govern the construction of any other contract; namely, that in case of doubt, the presumption is to be against the party whose it is, and that, in determining the construction, regard is to be had to the subject matter and the known motive for introducing the provision."

The case of *McMasters* v. *New York Life Insurance Company*, 78 Fed. 33, affirmed in 90 Fed. 40, is especially in point. Judge SHIRAS says, 90 Fed., p. 45:

> "Forfeitures are not favored, either at law or in equity; and to sustain the right to declare a contract, which has gone into effect, forfeited, by reason of a subsequent failure to perform its conditions, it is incumbent on the party pleading the forfeiture, to clearly establish the defense; and in the case of contracts like insurance policies, wherein the insured has no voice in the selection of the terms used, the construction must be against the party who prepared the contract; and, furthermore, if there be found in the policy provisions which are inconsistent or contradictory, force must be given to those that sustain, rather than to those which forfeit the contract."

In conclusion, it is submitted, that the policy was issued in favor of Peter Hagan & Company (who had as a firm no earthly interest in the Tug, Record, p. 20), and the words added "for account of whom it may concern," without any information being required as to whom the owners of the boat

really were. All questions of moral risk, based upon the personal character of the owners, was thereby eliminated from the contract by the act of the underwriter himself. Not until the proofs of loss were submitted, had he any knowledge who were the owners of the boat, either at the time the policy was issued or at the time the loss occurred, and a decision that the entire policy is forfeited, works manifest injustice. Though there has not been the slightest change in the risk under the policy, the Circuit Court of Appeals deprives Hagan even of the indemnity for the half interest which he still owned.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed, and a decree entered in behalf of the Petitioners.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel for Petitioners

No. 206.

FEB 25 1902
JAMES H. McKENNEY,
Clerk.

No. 206. Brf. of Edmunds for Respondents
No. 206. October Term, 1901.

Filed Feb. 25, 1902.

IN THE

Supreme Court of the United States.

PETER HAGAN and EDWARD F. MARTIN,
Petitioners,

v.

THE SCOTTISH UNION and NATIONAL INSURANCE COMPANY,
Respondents.

Argument on Behalf of Respondents

HENRY R. EDMUNDS,
Attorney for Respondents.

International, 307 Chestnut Street.

24074

Supreme Court of the United States.

October Term, 1901. No. 206.

PETER HAGAN and EDWARD F. MARTIN,

Petitioners.

v.

The SCOTTISH UNION and NATIONAL INSURANCE COMPANY.

STATEMENT OF FACTS.

On the nineteenth day of December, 1897, the respondent company issued to "Peter Hagan & Co. for account of whom it may concern," a policy of insurance against fire on the tugboat *Senator Penrose.*

On the fifteenth day of June, 1898, Peter Hagan, who with his son comprised the firm of Peter Hagan & Co., sold one-half of said steamtug to Edward F. Martin, the other libellant. No notice of this sale and transfer was given to the respondent company, nor had it any knowledge of the same, nor was it asked nor did it consent to the assignment.

It is provided by the terms of said policy, among other things,

That "if the interest of the insured be other than "unconditional and sole ownership,"

or

"if any change, other than by death of the insured,

"take place in the interest, title or possession of the sub-
"ject of insurance * * * whether by legal process
"or judgment or by voluntary act of the insured, or
"otherwise, or if this policy be assigned before the loss,"
"the entire policy shall be void."

The libellants claim that the words "for whom it may concern" entitles them to recover, notwithstanding the fact that Martin had no interest in *esse* or in contemplation at the time of the effecting the insurance and notwithstanding the assignment without the consent of the company.

The respondents contend that the words, "for whom it may concern," can and do only mean for whom it concerned, or in *contemplation*, either known or unknown, at the time of making the insurance, and that an assignment of the policy without the knowledge or consent of the company voids the policy.

24075

ARGUMENT.

It was decided in *De Bollé* v. *The Pennsylvania Ins. Co.*, reported in 4 Wharton, page 68, that

> "No one can claim the benefit of an insurance made "by another for account of whom it may concern, with- "out showing that it was the intention of the person "obtaining the insurance to embrace his interest in the "goods *at the time of the insurance.*"

And in *Fire Association* v. *Merchants' and Miners' Transportation Company*, reported in 7 Atlantic Reporter, page 905, the Court of Appeals of Maryland say:

> "That anyone having title to the property at the "time of the loss may, by adoption of the contract, "avail himself of its advantages, provided it be shown "that his interest was within the contemplation of the "party procuring the insurance."
>
> *Newson* v. *Douglass*, 7 Harris & Johns (Md.), 417; S. C., 16 Amer. Dec., 317.

D effected an insurance on the ship *Mohawk* in his own name, "for whom it may concern," being at the time the agent of one K, who subsequently sold the ship to N, administrator of C. In an action by N against D to recover the amount paid to him as insurance of the ship, it was held that the phrase, "whom it may concern," in a policy meant not any and everybody who might chance to have an interest in the thing insured, but such only as are in contemplation of the contract, BUCHANAN, *C. J.*, saying, "But 'whom it may concern,' is a technical phrase, common to policies of insurance, and is understood to mean not any and everybody who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. Such a policy *supposes an agency*, and proceeding upon that ground, looks only to the principal in whose behalf or on

whose account the agent moves in the transaction, and he for whose benefit the insurance is procured is the person in the contemplation of the contract and is he whom alone it concerns.

"It is equally clear that a policy in the name of one, with the general clause 'for whom it may concern,' will cover and protect the interest of any person for whose benefit it was intended, and who *authorized it to be effected.* And if in the absence of any express order or authority from the owner or any previous communication with him upon the subject, such policy is effected in his behalf, the intention at the time of the party effecting it to cover his particular interest, will so connect him with the policy as that his adoption of it afterwards will cause it to inure to his benefit."

In the case of *DeBollé* v. *Penna. Ins. Co.*, 4 Wharton (Pa.) 68, Judge KENNEDY, speaking for the Court, adverts to the conclusion arrived at by Phillips on Ins. (1 Phillips on Ins. 383) and says: "This would not only seem to be the fair deduction from the authorities on the subject, but to be supported likewise by reason, principles of sound policy and natural justice."

As a general proposition, the clause under consideration and others of similar import, apply only to those who were contemplated at the time the insurance was made.

1 Parsons on Shipping, 46.

Citing:

Routh v. *Thompson*, 11 East., 428;
Bauday v. *Union Ins. Co.*, 2 Wash. C. C. (U. S), 391;
Catlett v. *Pacific Ins. Co.*, 1 Paine C. C. (U. S.), 594;
Haynes v. Rowe, 40 Maine, 141;
Protection Ins. Co. v. *Wilson*, 6 Ohio Stat., 553;
Seamens v. *Loring*, 1 Mason, C. C. (U. S), 127;
Lambeth v. *Western F. and M. Ins. Co.*, 11 Rob. (La.), 82, and others.

24076

The petitioner, however, depends upon the decision of the Supreme Court of the United States, to be found in 98 Supreme Court Reports, page 528, *Hooper* v. *Robinson.*

A careful examination of this case, we now contend, will not support his contention. The facts were substantially as follows:

The British steamer *Carolina* met with a collision in Chesapeake Bay and put back to Baltimore for repairs. She was repaired, and Hooper & Co., her agents, paid the bills and made other disbursements for her. McGarr, the captain, drew on Good Brother & Co., of Hull, England, for the amount in favor of Hooper & Co., *and at the same time directed them to protect the drawees by insurance, which was intended to be done by the policy in question.*

The policy was to James Hooper & Co. "on account of whom it may concern," in case of loss to be paid to their order. The insurance was "lost or not lost" * * * "on merchandise to cover such risks as are approved and endorsed on the policy." The instrument was a cargo policy. The draft of McGarr was bought by Brown & Sons, bankers, of Baltimore, who transmitted it to their correspondents in London. On the eleventh of November, 1872, it was accepted by Good Brothers & Co., and on the fourteenth of December, following, they paid it. On the fourteenth of November, 1872, the vessel foundered at sea. Hooper collected the insurance on January 31, 1873, and remitted the amount to Good Brothers & Co., in England.

More than a month after the loss had been paid and the money remitted to England, the Insurance Company requested Hooper to write to England and request a return of the money, which he refused to do, whereupon suit was brought against him to recover the money.

One of the questions, which arose in the case, was had Good Brothers & Co. an insurable interest. The Court say:

> "A policy, like the one here in question, in the "name of a specified party, 'on account of whom it may

"concern,' or with other equivalent terms, will be "applied to the interest of the persons for whom it was "intended by the person who ordered it, provided the "latter had the requisite authority from the former, or "they subsequently adopted it."

And to sustain this, the Court say :

"The proof as to who was intended to be insured "is that they were Good Brothers & Co., and no one "else. * * * This 'fact is established by the testimony "of Hooper, and there is none other on the subject. "He is unimpeached and his testimony is conclusive.'

"The inquiry then arises whether Good Brothers & "Co. had any insurable interest in the cargo. It does "not appear whether they had or had not. We have "suggested several ways in which such an interest may "have arisen and shown that *under the policy in question*, "it would have been sufficient, if it had subsisted at any "time before the loss was known to them. It may "possibly have arisen in other modes. * * * In "order to maintain the plaintiff's case it was necessary "to be made to appear that Good Brothers & Co., *the* "*assured, had no insurable interest.*"

It appears by the case as reported, that the Court cited the following quotation from 1 Perkins' Arnould, 238 :

"It is now clearly established that an insurable "interest, subsisting during the risk, and at the time of "loss is sufficient, and that the insured need not also "allege or prove that he was interested at the time of "effecting the policy; indeed, it is every day's practice "to effect insurance in which the allegation could not be "made with any degree of truth; as for instance, where "goods are insured on a return voyage long before they "are bought."

This only confirms, it is submitted, the general rule heretofore stated, *i. e.*, if the person effecting the insurance had in mind an intention to secure another who was likely to have

2407

an insurable interest, the risk would attach *when* the interest was complete, if such other person authorized the insurance in the first instance, or subsequently adopted it. It does not avoid the necessity of the person who was to be assured being in *contemplation* at the time the policy was effected.

Justice SWAYNE, if he meant anything different from this, was unfortunate in his references and examples, for he says, p. 537, citing *Worthington* v. *Bearse*, and others (12 Allen Mass., 382):

> "Where a vessel insured for a stated time was sold "and transferred, and was re-purchased and transferred "back, within that time, it has been *held that the insur-* "*ance was suspended while the title was out of the assured*, "and was revived again on the reconveyance of the "assured during the term specified in the policy."

Justice SWAYNE says further, page 539:

> "The face of the policy and other facts, patent and "notorious, which must have been known to the under- "writers, showed clearly that the advances were made "and the insurance was effected by Hooper, *not for him-* "*self*, but for others."

In Arnould Marine Insurance Edition of 1887, page 110, it is said:

> "The intention at the time of the party who directs "the insurance to be effected, is the great point to be "ascertained in determining whose interest the policy "can be applied to protect."

Can it be possible that Hagen at the time of effecting the insurance, intended to protect the interest of Martin, which interest was not in contemplation, and of which there was then no thought that it ever would exist?

If the contention of the appellee be sound, then Hagan,

acting as agent, could do that for Martin which Martin could not do for himself. How much more reasonable would it be to say that Martin, *expecting* to have an interest in the tug, requested Hagan to insure such interest for him. Martin would then be in contemplation at the time of effecting the policy, and the policy under the authorities would attach to Martin's interest as soon as the interest was complete. It might even be admitted that Hagan, expecting that Martin or someone else might have an interest, effected an insurance intended to cover such interest when vested. The authorities do not intend to go any further than this.

It has also been decided in a multitude of cases that any change in the ownership or title of the property insured makes the insurance and policy void.

In the case at bar, the *possession* of the tug was also changed, Martin taking possession as master.

Sherwood v. *Agricultural Ins. Co.*, 73 N. Y., 447;
Hine v. *Woolworth*, 93 N. Y., 75;
Smith v. *Phenix Ins. Co.*, 23 Pac. R., 383.
Fire Assocn. v. Flournoy, 19 S. W. Rep., 793;
Tallman v. *Atlantic Fire and Marine*, 29 How., 71 (N. Y.);
Abbott v. *Hampden Ins Co.*, 30 Maine, 44.

In *Schroedel* v. *Humbolt Fire Ins. Co.* (S. C. of Penna.), 158 Penna. State, 459, it was said:

> "A condition in a fire insurance policy that it shall "be void 'if the intrest of the insured be not truly stated "therein, or if the interest in the insured be other than the "unconditional and sole ownership' precludes a recovery "where the title to the property is in the insured and his "wife jointly."
>
> *Oldham* v. *Anchor Mutual Fire Ins. Co.*, 57 N.W. Rep. (Feby. 24, 1894), p. 861.

"Where a policy on property used and owned by a

2407

"partnership runs to the partners jointly, a condition "that the property shall not be sold or transferred, or "any change take place in the title or possession, is "broken if two of the partners sell and deliver their in- "terest to the other partner, and the latter cannot recover "to the extent of his original interest."

The facts in the present case exhibit what is practically an assignment of the policy, and the language of the contract is definite, "if this policy be assigned before a loss," or "if the interest of the insured be other than unconditional and sole ownership" * * * or "if any change other than by death of the insured take place in the interest, title or possession of the subject of insurance,"the policy was to be void.

It is, however, claimed by the petitioners that the clauses last above referred to are in contravention of the clause *written* in the policy "for account of whom it may concern," and some stress seems to be laid upon the word "may" in the clause, as indictating future interest or ownership. Even admitting this to be true (and it is not necessarily certain that the word "may," in the clause, might not as well mean *may now* as *may hereafter*, still, we contend the future interest or ownership must, under the authorities, *be in contemplation*, when the insurance is made.

It is quite frequently the practice to sell bills of lading representing cargo with an insurance note attached, to whatever banker or broker, who may be disposed to purchase, but this banker or broker, or whoever may hold the bill of lading is the very person in contemplation, when the insurance is effected and was intended.

This, however, is not like the case now here presented. The policy in question was an insurance on the hull of a steamboat against fire, and ran for one year.

The court below has well said, that the clauses referred to are not repugnant. "That the policy was issued for account of whom it might concern is undeniable, but whom could it concern? Possibly the then existing or future

creditors of the boat, or perhaps the constituents of Peter Hagan and Company; but no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of anyone who, by the express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it."

HENRY R. EDMUNDS,

Attorney for the Respondent.

24079

Supreme Court of the United States.

No. 206.—October Term, 1901.

Peter Hagan and Edward F. Martin, Petitioners, vs. The Scottish Union and National Insurance Company.	On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 2, 1902.]

This is a libel in admiralty by the petitioners, Peter Hagan and Edward F. Martin, on a policy of insurance issued by the Scottish Union and National Insurance Company, November 19th 1897, against loss or damage by fire to an amount, not exceeding $2,000, on the tug boat Senator Penrose. The District Court made a decree for the libellants. (98 Fed. Rep. 129.) This decree was reversed by the Circuit Court of Appeals for the Third Circuit. (102 Fed. Rep. 919.)

By the policy it is provided, among other things, that the company—

"In consideration of the stipulations herein named and of twenty-five dollars premium does insure *Peter Hagan and Company for account of whom it may concern* for the term of one year from the 19th day of November, 1897, at noon, to the 19th day of November, 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding *two thousand* dollars, to the following-described property while located and contained as described herein, and not elsewhere, to wit:

"On the iron tug Senator Penrose, her hull, tackle, apparel, engines, boilers, machinery, appurtenances, furniture and supplies.

"Privilege to engage in such employment as may be incidental to her trade; also to lay up and haul out on railways and dry docks and to undergo alterations and repairs; also to use kerosene oil for lights.

"Other insurance permitted without notice until required.

"N. Y. and Penna. standard,

Percentage coinsurance clause.

"If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than 80 per cent of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said 80 per cent of the actual cash value of such property.

"Attached to policy No. 2,139,457 Scottish U. & N. Insurance Co.

"S. D. Hawley & Son,
Agents, Resident Managers."

* * * * * *

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or

not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within-described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building or ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss," &c.

The words "Peter Hagan and Company for account of whom it may concern" are written with a pen, while the paragraphs commencing with the words "On the iron tug," and ending with the words "S. D. Hawley & Son, Agent, Resident Managers," are in typewriting, and on a separate strip attached to the face of the policy.

In June, 1898, Peter Hagan, who obtained the insurance, sold one-half interest in the tug to Edward F. Martin, and the latter held that interest at the time of the destruction of the tug by fire. No notice was given to the insurance company of the fact that Martin had acquired an interest in the boat. The respondents denied all liability to the plaintiffs because no notice was given of the change of ownership or of the interest in the tug by respective libellants as required by the terms of the policy.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The decision of this case turns upon the significance to be given to the written provision of the policy which provides for insuring "Peter Hagan and Company for account of whom it may concern."

In the District Court Judge McPherson said:

"The decision of the case depends upon the effect to be given to the words 'for whom it may concern.' This clause, so far as it may be in conflict with other language in the policy, must, upon familiar principles, be regarded as dominant. It expresses the special agreement of the parties, for it is in writing, while the conflicting provisions are in print; and general printed conditions usually give way to deliberately chosen written words. Moreover, even if the court doubted which provision should prevail, another well-known rule requires the policy to be construed against the company rather than against the insured; and, therefore, upon either ground, the clause now under consideration is control-

ling. . . . The first step, therefore, in a given case is to determine what interest the person taking out the policy intended to protect. It is not essential that he should have had any specific individual in mind. It is enough if he intended to protect the interest that afterwards passed to the person injured; and if he so intended, the policy may be adopted afterwards by a subsequent sole or partial owner of the interest, although such owner may have been unknown to the person taking out the insurance, or to the company, at the time the policy was written. In the present case I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object the policy would more naturally have been taken out in his own name, omitting the qualifying phrase; but he intended to protect the ownership of the boat, whether vested in himself alone, or shared with, or transferred to, other persons. This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists. The facts bring the dispute within the rule laid down in *Hooper* v. *Robinson*, (98 U. S. 528,) and in other cases to which reference need not be made."

The decree of the District Court was reversed by the Circuit Court of Appeals, with directions to dismiss the libel with costs. Judge Dallas, speaking for that court, said:

"It is true that the written terms of a policy will control where they are in plain conflict with its printed clauses; but no part of the instrument is to be rejected if it can be sustained as a whole, and in the present instance the printed provisions in question and the written words 'for account of whom it may concern,' are not irreconcilably repugnant. That the policy was issued for account of whom it might concern is undeniable, but whom could it concern? Possibly the then existing or future creditors of the boat, or perhaps the constituents of Peter Hagan and Company; but, no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of any one who, by the express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it. It is not necessary to our conclusion that we should question the rule of law which was applied by the court below, and we do not do so. It is not doubted that a policy in the name of a special party, on account of whom it may concern, will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known; but we find nothing in this case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein. On the contrary, we think, as we have already said, that the retention in the policy of the provision that it should be entirely void if any transfer in interest, title or possession should be made, absolutely precludes the inference of an intent to make the policy applicable to any person claiming under or by virtue of such a transfer."

In these two extracts from the opinions delivered in the courts below we find the different views of the judges of those courts upon the question at issue. It is to be observed, in the first place, that the policy in question

covers property on the water viz., a tug boat, yet the printed portion of the policy shows that it was intended generally to be used for insuring property on land. A marine policy was made out upon blanks not intended for that kind of insurance. Consequently many of the printed provisions were wholly inapplicable to insurance of property on the water.

Where a marine policy is thus taken out upon a blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application.

In *Dudgeon* v. *Pembroke*, decided in the English House of Lords, in 1877, (2 App. Cas. 284, at 293,) in speaking of this question of the difference between the written and the printed portions of a policy, and in delivering the opinion of the court, Lord Penzance said:

"My lords, the policy in this case is a time and not a voyage policy, and not only so, but an ordinary time policy. There can, I apprehend, be no doubt upon that point. It has been suggested that, by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe, and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law to permit of any such conclusion."

This rule is recognized and assented to by both courts below. If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail. It becomes necessary, therefore, to determine what is the meaning of the written portion of the policy, and what was intended by the parties by the language "on account of whom it may concern." Both courts below concur in the statement that a policy so worded will cover the interest of the person for whom it was intended by the party taking out the insurance, even though the particular person intended was not then known. It was said in the District Court that it was enough if the person taking out the insurance intended to protect the interest that afterwards passed to the person injured; that it was not essential that he should have had any

specific individual in mind at the time when he took out the insurance. The opinion of the Court of Appeals concedes that a policy in the name of a special party, "on account of whom it may concern," will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known. But the Court of Appeals was unable to discover anything in the case to support a finding that Hagan (the person taking out the insurance) intended to insure a subsequent vendee of the boat or of an interest therein, because of the retention in the policy of the printed provision that it should be entirely void, unless otherwise provided by agreement, if any change in the interest, title or possession should be made. The retention of this printed provision, the court said, precluded the inference of any intent to make the policy applicable to any person claiming under or by virtue of such transfer.

We concur in the view that by virtue of the language contained in the policy, "on account of whom it may concern," it is not necessary that the person who takes out such a policy should have at that time any specific individual in mind. If he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured, that would be enough. In *Hooper* v. *Robinson*, (98 U. S. 528,) it was said that a policy upon a cargo in the name of A, on account of whom it may concern, will inure to the interest of the party for whom it was intended by A, provided he at the time of effecting the insurance had the requisite authority from such party or the latter subsequently adopted it. The facts in that case differ materially from those presented by this record, but the meaning of the language "on account of whom it may concern" is stated in the opinion of the court, and authorities are therein cited which show that it is not necessary that at the time of effecting the insurance the person taking it out should intend it for the benefit of some then known and particular individual, but that it would cover the case of one having an insurable interest at the time of the happening of the loss, and who was intended to be protected at the time the party took out the insurance.

In 1 Phillipps on Insurance it is stated:

"SEC. 385. The rule, that an insurance 'for whom it may concern' will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended. . . . But he may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person subsequently ascertained to have such an insurable interest, who adopts the insurance.

"SEC. 388. One may become a party to the insurance effected in his behalf, in terms applicable to his interest, without any previous authority from him, by adopting it, either before or after a loss has taken place and is known to him, though the loss may have happened before the insurance was made."

In 2 Duer on Marine Insurance, p. 28, it is stated as follows:

"In England, the policy in its usual and almost invariable form contains a general clause, the terms of which are sufficiently comprehensive to embrace all persons who have an insurable interest in the property, and a lawful right to be insured. The insurance is expressed to be 'in the name of A. B., (the person effecting the policy,) as well in his own name as for and in the name and names (without specification) of all and every other person and persons, to whom the same (the property insured) doth, may or shall appertain, in part or in all.' In the United States, as on the continent of Europe, the general clause is framed in various forms of expression, and the construction necessarily varies, as the terms used are, more or less, extensive in their application. In some cases the insurance is expressed to be 'on account of the owners.' In some, on 'account of a person or persons, to be thereafter named;' but its most usual form is, 'on account of whom it may concern.' An insurance on account of the 'owners,' is probably limited to those who have a legal interest in the subject insured. But the words, 'on account of whom it may concern,' are co-extensive in their possible application, with the general clause of the London policy."

And the learned author adds in a note the following:

"The Philadelphia policies retain the English form; and why it has been departed from in any of the cities of the Union, it is not easy to understand. The words are the most comprehensive and significant that could be chosen, since they apply not only to all persons, but to every species of interest. As the clause, however, 'for whom it may concern,' has received the same construction, it is not now necessary to alter it."

The English form insures the person to whom the property insured "doth, may or shall appertain," thus insuring the owner or one who has an interest in the property at the time when the loss occurs. And the author says the words "on account of whom it may concern" have the same significance as the language used in the English form.

We are constrained to differ from the conclusion arrived at by the Circuit Court of Appeals in its statement that there was nothing in the case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein, because of the retention in the policy of the provision that it should be entirely void, unless otherwise provided by agreement, if any change, &c., should be made. It seems to us that the very purpose of stating that the insurance was on account of whom it may concern was to do away with the printed provisions in regard to the sole ownership and to the change of interest. It was an agreement "otherwise provided," than in the printed portion of the policy. It provided for the happening of a contingency by which at the time of the loss the person taking out the insurance might not be the sole and unconditional owner of the thing insured because of a change in the interest or title happening by the act of such person between the time of taking out the insurance and the occurrence of the loss. This, we think, was the intention

of the party taking the insurance, to be arrived at by reading the written language of the policy and by reference to the fact that he intended to insure the whole title, and not his mere interest therein from time to time. Otherwise we do not see what effect is given to the written portion of the instrument.

There is no doubt, and the District Court so found, that Hagan intended by the policy to secure the insurance upon the entire title, and he therefore intended thereby to protect that title during the running of the policy, and when the clause is added in writing that it was issued on account of whom it may concern, it shows that he intended that such title should be protected in the hands of any person to whom he might transfer the same or any portion thereof. If otherwise, and the intention were only to protect his own interest, the policy, as stated by the District Judge, would naturally have been taken out in his own name, omitting the qualifying phrase, on account of whom it may concern. This phrase was put in for some purpose, and such purpose was, as it seems to us, to protect the whole title without making it necessary to notify the company and obtain its consent to any transfer of interest.

At the time when Hogan took out the policy he was sole owner, and unless he intended the written words to apply to those to whom he might afterwards assign his interest or some portion thereof, the language would seem to fill no purpose.

If the policy were to become void in case of a transfer of all or any part of the interest of the person taking out the insurance unless the company were notified and provided by agreement endorsed on the policy for such change, we do not see that any alteration in its terms and meaning was accomplished by the insertion of the phrase in question. By the interpretation contended for by the company, it would have the same right, if the written provision were contained therein, to refuse to otherwise provide by agreement for the transfer of an interest, that it would have if such provision were sticken out, and the terms of the policy would in truth be unaltered by the insertion of that provision. We think this would be a totally different result from that contemplated by the parties. The words "on account of whom it may concern" do not refer to those interested in the policy simply at the time it is taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at the time that he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied. We think this the common sense interpretation of the language used and that it is justified and required by the authorities, many of which are cited in *Hooper* v. *Robinson*, (*supra.*)

Northern Assurance Company v. *Grand View Building Association*, (183 U. S. 308,) has no bearing upon this case. There the party insured proved by parol an alleged waiver, by the general agent of the company, of one of the conditions in the policy which required that such waiver should only be given in writing and endorsed on the policy. It was contended that the company was estopped because of the conduct of the agent in the existing circumstances, in issuing such policy and taking the premium, from setting up and claiming the benefit of the condition. This court held that the evidence was improperly received, and reversed the judgment.

In this case there is no question of receiving parol evidence to alter or change any condition in the policy. It is simply a question of construction as to the meaning of the language used in the policy, and as to the intention of the party taking it out, and whether the written portion (the intention of the party being as stated) is inconsistent with any printed portion thereof; and if so, whether it should prevail as against such printed portion. We think the written portion is inconsistent with the printed condition as to change of interest, and as to sole ownership, and there being such inconsistency the written portion must be held to cover the assignee of a part interest in the tug, as intended at the time by the party taking out the insurance.

The judgment of the Circuit Court of Appeals must be reversed, and that of the District Court of the United States for the Eastern District of Pennsylvania affirmed, and it is

So ordered.

Mr. Justice GRAY did not hear the argument and took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.